Supreme Court, U.S.
FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-332

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890

Petitioner,

vs.

J. R. NORTON COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

Whether the federal policy favoring uniform application of labor laws requires state courts to adopt the agency standard set forth in Section 6 of the Norris-LaGuardia Act (29 U.S.C § 106) in determining a union's vicarious liability for misconduct of union members engaged in picketing during a strike.[1]

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[1] The caption contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioner General Teamsters, Warehousemen and Helpers Union, Local 890 is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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Petitioner,

v.

J. R. NORTON COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner General Teamsters, Warehousemen and Helpers Union, Local 890 prays that a writ of certiorari issue to review the opinion of the Supreme Court

of the State of California in these proceedings.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Sixth Appellate District is reported as J.R. Norton v. General Teamsters, Warehousemen and Helpers Union, Local 890, 208 Cal.App.3d 71 (reproduced herein as Appendix A). The decision of the Supreme Court of the State of California denying review of the decision of the Court of Appeals has not yet appeared in official reports. It is reproduced herein as Appendix B.

JURISDICTION

The decision of the Supreme Court of the State of California issued on May 18,

1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), and 28 U.S.C. § 2101(c).

FEDERAL STATUTORY PROVISIONS INVOLVED

The federal statute relevant to this petition is § 6 of the Norris-LaGuardia Act (29 U.S.C. § 106):

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

STATEMENT OF THE CASE

I. THE PROCEEDINGS BELOW

In 1982, Petitioner General Teamsters, Warehousemen and Helpers Union Local 890 (the Union) engaged in a strike against Respondent J. R. Norton Company (Norton). Norton filed a complaint in the Superior Court of the State of California against the Union, five employees of Norton who had participated in picketing, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the International) seeking compensatory and punitive damages for alleged threats of violence and violence during the strike.

At trial, the court gave conflicting jury instruction with respect to the vicarious liability of the Union for the

acts of the striking employees.[1] The Union proposed and the court gave a jury instruction based on § 6 of the Norris-LaGuardia Act (referred to herein as § 6) indicating that the Union could be found liable only "upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (App. C, C-10). The jury was also instructed that "clear proof" was a higher standard of proof that "preponderance of the evidence" (id).

However, at Norton's request and over the objection of the Union, the Court also gave instructions permitting the jury to find the Union liable if a

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[1] The relevant jury instructions are reproduced in Appendix C.

preponderance of the evidence showed that the Union negligently supervised the strike. Thus, the court gave California common law instructions regarding: (a) The liability of a principal for acts of its agents (App. C, C-3 through C-5); (b) Respondeat superior (App. C, C-6); (c) Negligence (App. C, C-1 through C-2); and (d) Preponderance of the evidence as the burden of proof (App. C, C-8 through C-9).

The jury found the International was not liable. The jury found the five individual defendants liable for conspiracy to commit acts of violence, wrongful conduct other than negligent supervision, and violations of Section 51.7 of the

California Code of Civil Procedure.[2] The jury assessed compensatory damages of $20,000, punitive damages of $1,000 and civil penalties of $2,000 against the individuals.[3]

The jury found the Union had not engaged in specific acts of misconduct and had not engaged in a conspiracy to commit violence, but found the Union liable for negligent supervision of the strike, and that the Union had acted with malice and oppression. The jury awarded

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[2] Section 51.7 of the California Civil Code provided: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute."

[3] Neither the judgment in favor of the International nor the judgments against the individuals were appealed.

compensatory damages of $252,000[4] and punitive damages of $360,000 against the Union.

On appeal, the Union contended that § 6 preempts state law burden of proof concepts with respect to the vicarious liability of a union for acts of its members during a strike, and/or that national labor policy requires states to adopt the more restrictive burden of proof concepts of § 6 in such cases. The Court of appeals rejected both contentions, finding that § 6 is not applicable to tort actions adjudicated in state courts. The Supreme Court of the State of California denied review without an opinion.

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[4] The compensatory damages were based on profits lost by Norton during the strike, not property damage or physical injury.

II. FACTS RELEVANT TO THE ISSUE PRESENTED

The strike giving rise to this case occurred in September, 1982. The threats and violence for which damages were awarded occurred during the first three weeks of the strike.[5] Although there was substantial evidence that striking employees of Norton engaged in misconduct during the strike, there was no showing that any officer or business agent of the Union threatened violence, committed violence, or was present when such conduct occurred at Norton's premises. Thus, the Union was not found to have engaged in such conduct. The facts supporting the

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[5] The misconduct engaged in by picketing employees of Norton is summarized in the decision of the Court of Appeal (Appendix A).

jury's determination that the Union "negligently supervised" the strike and that the Union acted with malice and oppression may be briefly summarized as follows:

On the second day of the strike Norton obtained a state court restraining order prohibiting violence and threats of violence. Approximately a week after the strike commenced, Norton sent two mailgrams to the Union complaining of misconduct on the picket line. A Union business agent asked the strikers if they had engaged in misconduct, and accepted their denials. The Union President did not believe the claims of misconduct. Officers and/or business agents of the Union were present on the picket line fewer than three times. The Union did not select picket captains or monitor the

conduct of the strikers. The Union's lawyer represented a striker in a criminal proceeding related to picket line misconduct, and the Union paid the striker's fine.

REASONS FOR GRANTING THE WRIT

I. § 6 OF THE NORRIS-LAGUARDIA ACT APPLIES TO FEDERAL COURT ACTIONS AGAINST UNIONS ARISING OUT OF LABOR DISPUTES

§ 6 has been uniformly applied by federal courts to various actions against unions arising out of labor disputes. In United Brotherhood of Carpenters v. United States, 330 US 395, 91 L.Ed 973, 19 LRRM 2406 (1947) this Court held that § 6 is applicable to an alleged criminal violation of the Sherman Act (15 U.S.C. § 1, et seq.) by a Union, where the al-

leged violation arises out of a labor dispute:

> ". . . whether § 6 should be called a rule of evidence or one that changes the substantive law of agency . . . its purpose and effect was to relieve organizations . . . and members of those organizations for liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration." (id. at 403)

Later, in Rasmsey v. United Mine Workers of America, 401 US 302, 28 L.Ed.2d 64 (1971) this Court held that § 6 is applicable to alleged civil violations of the Sherman Act, where the alleged violation arises out of a labor dispute. The Court made clear that while

the underlying acts establishing a violation of the Sherman Act may be established by a preponderance of the evidence, a union may not be found liable for the acts of its officers, agents or members unless there is clear and convincing evidence as to the union's authorization, participation in, or ratification of the acts allegedly performed on its behalf (id. at 311).

In United Mine Workers v. Gibbs, 383 US 715, 16 L.Ed.2d 218, this Court held that § 6 governs the liability of a union in state tort strike violence actions

adjudicated in federal courts.[6] More specifically, the Court found the district court erred by failing to give a jury instruction based on § 6. The Gibbs court noted:

> "The driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damages done by acts beyond their practical control. Plainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes . . ." (id. at 736-737)

Although Gibbs requires application of § 6 to state tort actions tried in

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[6] In Gibbs plaintiff sued a union in federal court for damages resulting from an unlawful secondary boycott pursuant to Section 303 of the National Labor Relations Act (29 U.S.C §187), and for damages for the state tort of interference with business relationships based upon violence during a labor dispute. The state tort action was tried in federal court.

federal court, there is no reported federal decision dealing with the question of whether state courts must apply § 6 when such actions are tried in state courts.

II. THERE IS WIDE DIVERGENCE BETWEEN THE STATES AS TO THE APPLICABILITY OF § 6 IN STATE COURT ACTIONS

Two states, Michigan and Louisiana, have held that application of § 6 to state tort actions tried in state court is required by federal law. See: Sowels v. Laborers' International Union of North America, 112 Mich.App 616, 317 N.W.2d 195 (1981); Melancon v. United Association of Journeymen, 386 So.2d 669 (1980), writ refused 387 So.2d 596 (La. App. 1980).

Four states, Kansas, Florida, New Mexico, and Connecticut have held that they are not required to apply § 6, but

have adopted the standards of § 6 as state policy to promote consistency with the federal courts and conformity with congressional intent. See: Heistand v. Amalgamated Meatcutters, etc., 233 Kan. 759, 66 P.2d 671 (1983); International Union of Operating Engineers v. Long, 362 So.2d 987 (Fla. App. 1978); Gonzales v. Oil, Chemical and Atomic Workers International Union, 77 N.M. 61, 419 P.2d 257 (1966); and United Aircraft Corp. v. International Association of Machinists, 161 Conn. 79, 285 A.2d 330 (1971).[7]

Three states, North Carolina, Arizona, and Washington, have refused to apply § 6 to state court actions. See:

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[7] The Connecticut court reached this result by interpreting a state statute patterned after § 6.

R. H. Bouligny, Inc. v. United Steelworkers of America, 270 N.C. 160, 154 S.E.2d 344 (1967); Carter-Glogau Labs v. Construction Laborers Local 382, 736 P.2d 1163 (1986); and Buchanan v. International Brotherhood of Teamsters, etc., 94 Wash.2d 508, 617 P.2d 1004 (1980)

The instant case was one of first impression for the California courts of appeal. Subsequent to the decision in the instant case, a similar result was reached in Vargas v. Retail Clerk's Union Local 1428, 89 Daily Journal D.A.R. 9364 (California Court of Appeal, Second Appellate District, July 20, 1989).[8] In Vargas, a union was held vicariously liable for various threats and violence

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[8] The decision has not yet appeared in official reports. It is reproduced for the Court's convenience in Appendix D hereto.

during a labor dispute. The appellate court rejected the union's contention that § 6 should be applied by California courts in such actions, citing the appellate court's decision in the instant case. However, dissenting justice Spencer characterized the appellate court's decision in the instant case as unpersuasive:

> "In my view, the propriety of adopting the higher standard of proof is supported by Congress' determination such a standard of proof should apply in federal court adjudications of state-law claims in order to protect unions from potential destruction through compensatory and punitive damage awards based upon acts beyond their control [citation omitted]. Adoption of the higher standard of proof also is justified to combat the tendency to blame unions for everything occurring during a strike, whether authorized or ratified or not [citation omitted] and to prevent forum-shopping for the most favorable

standard of proof." (id. App. D, D-104 through D-105)

III. THE COURT SHOULD DECIDE WHETHER NATIONAL LABOR POLICY REQUIRES STATES TO APPLY § 6 TO TORT CLAIMS ADJUDICATED IN STATE COURTS

This Court has frequently held that states must adopt and apply federal labor law in order to assure uniform application of national labor policy throughout the states. The uniform application of federal labor law has been achieved by finding that certain federal labor statutes preempt state law, and also holdings that the federal courts are authorized to fashion a federal common law which state courts must apply. Examples of the uniform application of federal labor law are described below.

A. National Labor Relations Act Preemption

In San Diego Building Trades Council v. Garmon, 359 US 236 (1959) this Court held that the National Labor Relations Act (NLRA), 29 U.S.C. §151 et seq., preempts state torts based on conduct which arguably violates the NLRA. In Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 US 274 (1971) a union member sued a union in state court for breach of contract, alleging the union had breached its constitution and by-laws by having him terminated from his employment for failure to pay dues to the union. The Court held, consistent with Garmon, supra, that the member's claim was preempted by the NLRA.

The preemptive effect of the NLRA has been held to override state trespass

laws. In Hudgens v. NLRB, 424 US 507 (1976), the Court held that the question of whether a union could establish pickets in a privately owned retail shopping center adjacent to the store with which it had a dispute was governed exclusively by the NLRA (id. at 521). On remand, the National Labor Relations Board held that such picketing was protected by the NLRA, even though it might amount to trespass under state law (230 N.L.R.B. 414 (1977)).

B. National Labor Policy Requires States to Apply Federal Substantive Law in Actions Related to the Enforcement of Collective Bargaining Agreements

In the landmark case of Textile Workers Union v. Lincoln Mills, 353 US 448 (1957), this Court held that Section

301(a) of the NLRA, 29 U.S.C. §185(a),[9] confers jurisdiction on federal courts to compel arbitration under the terms of a collective bargaining agreement, and that national labor policy authorizes federal courts to develop a body of substantive contract interpretation law in such cases. The Court noted that ". . . if compatible with the purpose of § 301, [state law] may be resorted to in order to find the rule that will best effectu-

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[9] Section 301(a) of the NLRA provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

ate the federal policy." (id. at 457). But, state law would be "absorbed as federal law and [would] not be an independent source of private rights." (id. at 457). "It is not uncommon for federal courts to fashion law where federal rights are concerned." (id. at 457).

Subsequently, in Charles Dowd Box Co. v. Courtney, 368 US 502 (1962) this Court held that state courts have concurrent jurisdiction with federal courts over suits to enforce collective bargaining agreements. Then, in Local 174, Teamsters v. Lucas Flour, 369 US 95 (1962) this Court held that although state courts have concurrent jurisdiction over suits to enforce collective bargaining agreements, in such suits state courts must apply federal common law in

interpreting collective bargaining agreements:

> . . . the existence of possible conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms for final arbitral or judicial resolution of disputes. . . . in enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules. (id. at 104)

Thus, even though § 301(a) of the NLRA by its terms simply grants federal courts jurisdiction to hear claims for enforcement of collective bargaining agreements, the Court has broadly construed § 301(a) to authorize federal courts to develop federal substantive law and to require uniform application of federal substantive law in both state and federal courts.

C. National Labor Policy Requires State Courts to Apply Federal Common Law to Certain Torts Adjudicated in State Courts

The NLRA does not preempt traditional state court causes of action for tortious conduct which states have a compelling interest in preventing. For instance, state court actions for damages arising from violence or threats of violence during a strike are not preempted by the NLRA. See United Construction Workers v. Laburnum Construction Corp., 347 US 656 (1954). But, in certain areas national labor policy has been construed to require state courts to apply judicially developed federal common law to state court actions for tortious conduct.

In Vaca v. Sipes, 386 US 171 (1967) a member sued his union in state court

alleging that the union had failed to process a grievance protesting the termination of his employment. This Court held that such actions are not preempted by the NLRA, and that a union's status as exclusive bargaining representative under the NLRA imposes on a union the duty to fairly represent employees. But, although such duty of fair representation actions are not preempted and may be adjudicated in state courts, federal law governs the substance of the action. Accordingly, state courts must apply federally defined substantive law in determining whether a union breached its duty of fair representation.

In DelCostello v. Teamsters, 462 US 151 (1983) this Court considered whether the statute of limitations in duty of fair representation actions

should be borrowed from state law. The Court held that the national policy favoring uniform application of labor laws warrants deviation from the normal rule that in the absence of a federal statute establishing a statute of limitations, the limitations period should be borrowed from state court. Accordingly, the Court held that the statute of limitations in duty of fair representation suits should be borrowed from the six month limitations period for unfair labor practices under the NLRA.

In Linn v. United Plant Guard Workers, 383 US 53 (1966) this Court held that the NLRA does not fully preempt state libel actions arising from conduct during a labor dispute. But, national labor policy requires a showing of malice

to establish a cause of action for defamation during a labor dispute. The strict standard of malice was adopted because "[n]ot only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the [NLRA], but . . . such suits might be used as weapons of economic coercion." (id. at 64) The Court adopted the malice standard from New York Times Co. v. Sullivan, 376 US 254 (1964) "by analogy, rather than under constitutional compulsion." (id. at 65) However, even where malice is established, recovery in such defamation actions must be limited to actual damages (id. at 65-66). The Court noted that ". . . if experience shows that a greater curtailment, or even a total one, should be necessary to prevent impairment of

[national labor] policy, the Court will be free to reconsider today's holding." (id. at 67).

A similar limitation on the right of state courts to apply state tort law was found to be justified by national labor policy in Farmer v. Carpenters Local 25, 430 US 290 (1977). In Farmer a union member sued a union in state court for failure to refer him to employment and for harassment. The Court held that the job referral aspect of the suit was preempted by the NLRA, but that the harassment aspect of the suit was not preempted. But, recovery in state court for such harassment must be limited to facts establishing outrageous conduct by the union:

> . . . [t]he potential for undue interference with federal regulation would be intolerable if state tort recoveries could be

based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts. (id. at 305-306)

* * *

. . . state trial courts have the responsibility in cases of this kind to assure that the damages awarded are not excessive. (id. at 306)

D. National Labor Policy Favors Application of § 6 to Tort Actions Adjudicated in State Courts

Congress enacted § 6 because of its concern "that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible." Ramsey v. United Mine Workers, supra, at 310. "The driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damages done by acts beyond

their practical control." United Mine Workers v. Gibbs, supra, at 736-737. The fear that unions will be held liable for acts beyond their control exists whether tort actions are tried in federal or state court. Indeed, the jury's finding in the present case exemplifies the reality of that fear. There was no evidence that the Union or its officers or agents had engaged in threats of violence or violence. The jury specifically found that the Union had not engaged in such conduct, and that the Union had not engaged in a conspiracy to commit such acts. Yet, the jury found the Union liable for negligently supervising the strike. This is precisely the type of vicarious liability which Congress sought to avoid by enacting § 6.

If, as this Court has held, national labor policy allows federal courts to fashion substantive rules of law to be applied by state courts, and limits the power of state courts to award damages against unions for traditional torts such as defamation and harassment, then uniform application of the § 6 standard of proof in tort actions adjudicated in state courts is equally required to prevent the evil which Congress so clearly and correctly identified.

As noted in Section II of this Petition, supra, there is substantial disagreement between the states as to the applicability of § 6 to tort actions adjudicated in state courts. The conflicting rules adopted by various states are inconsistent with Congressional intent and national labor policy, and

subject unions to various standards of liability depending on the forum selected by a plaintiff. The absence of federal decisions as to the applicability of § 6 in state court actions, and the inconsistency between the states leaves a void which can be filled only by this Court's consideration of the applicability of § 6 to state court actions.

CONCLUSION

Based on the foregoing, the Court is requested to grant this petition for writ of certiorari to consider the applicability of § 6 of the Norris-LaGuardia Act to tort actions adjudicated in state courts in order to resolve conflicts between the states and to

estaablish a uniform national policy in such cases.

August, 1989

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APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

J.R. NORTON COMPANY, Plaintiff-Respondent, vs. GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION LOCAL 890, Defendant-Appellant	#H001762 (Monterey Cty. Super. Ct. #78550)

General Teamsters, Warehousemen and Helpers Union, Local 890, (the Local) appeals from a jury verdict awarding compensation and punitive damages to J.R. Norton Company for losses caused by negligent supervision of strikers during a 1982 labor dispute. The Local contends that the trial court gave conflicting instructions, erroneously giving the

California common law agency liability and preponderance-of-the-evidence standard of proof, and correctly instructing in the language section 6 of the Norris-LaGuardia Act (29 U.S.C.A. §106.[1] The Local maintains that the section 6 standard of "clear proof" of actual participation in, approval of, or ratification of members' misconduct preempts state law, and that the erroneous instruction created an irreconcilable conflict. Therefore, the judgment in favor of J.R. Norton Company (Norton) should be reversed. Appellant also complains of various errors relating to the punitive damages.

We hold that section 6 does not preempt state law in this respect and find that appellant's further contentions are without merit.

PROCEDURAL BACKGROUND

This action arises out of a labor dispute six years ago between striking members of the Local and Norton, an Arizona farming corporation. After violence on the first day of picketing on September 21, 1982, Norton sued the Local, the International Teamsters Union (the International), and numerous individual strikers for injunctive relief and damages. A temporary restraining order was granted by the second day of the strike, but incidents of violence and intimidation continued during the next few weeks. In 1986, the claims for damages were brought to trial against the Local, five named individual defendants, and the International.

Norton alleged a conspiracy to commit unlawful acts among the defendants, tortious interference with business by all the defendants, a violation of Civil Code section 51.7[2] alleging violence or intimidation in a labor dispute, and negligent supervision of the strike by the Local and the International. Norton claims $637,106 in lost profits.

The jury found the five individual defendants liable for both conspiracy and wrongful conduct other than negligent supervision; found the individuals in violation of Civil Code section 51.7 and assessed a fine against them pursuant to Civil Code section 52, subdivision (b);[3] found the Local liable for negligent supervision; and found both the Local and the individuals had acted with

oppression and malice, and awarded and apportioned punitive damages. Local's share of the compensatory damages was $252,000 and of the punitive damages was $360,000. Local is the only party involved in this appeal.

FACTS

In 1982, Norton farmed lettuce on a rotational system in Gilroy, Blythe, and the Imperial and Salinas Valleys in California, as well as in parts of Arizona and New Mexico.

Local was the elected representative of Norton employees whose job duties included driving haul trucks with box stitching machines from the truck shops on Norton's ranches to the lettuce fields. There, they stitched and folded boxes containing the harvested lettuce, and hauled them to the cooling shed for

further handling. The employees who actually harvested the lettuce were not part of the Local and were not on strike. Some employees at the cooler walked off their jobs in sympathy with the strikers, but they were members of an AFL-CIO union and were not themselves on strike.

Negotiations took place between April and July of 1982. The negotiating committee was comprised of three individuals elected by Local's total membership, which had also authorized the strike. On September 21, 1982, the committee did call a strike, in conformity with the bylaws of the Local and the International. The International paid strike benefits.

Norton's causes of action arose from threats and violence centered at the Salinas Cooling Company, but also

occurring at Norton's four lettuce ranches (Airport, Martin, Bungard Hart, and Firestone), all within three to four miles of the cooler.

On the first day of the strike, Norton was not harvesting, since it was "up on [its] fields." Between 15 and 30 pickets blocked the entrance to the Airport Ranch, at least one holding a rock. This interfered with Norton's plan to move its trucks to the cooler for safekeeping. Sheriff's deputies were called and there was pushing and shoving. One striker, who was also a negotiating team member, was arrested. Strikers followed Norton's drivers to the cooler, but there was no violence. The arrested striker was dropped off at the union hall at his request after he was booked.

Harvesting started at the Firestone Ranch on the second day. Sheriff's deputies again had to clear the road at Airport Ranch for trucks to be taken to Firestone. Only two trucks were taken out, and the picketers banged their signs on the trucks as they passed. A stitcher, that had been assigned before the strike to a striking employee, broke. Parts had been put in upside down, and other parts were missing. Sabotage by the employee was suggested. Spikes and nails were thrown on the roadways and under labor crew buses causing flat tires.

By the end of that day, Norton had obtained a temporary restraining order prohibiting violence and limiting the number and locations of pickets. Norton also postponed harvesting for seven days.

Notwithstanding the restraining order, however, "it got more hectic everyday [sic] . . . seemed like more apt to have violence everyday [sic] as the days progressed," according to an eyewitness. Strikers tried to pull one Norton employee out of the truck he was driving, and three rocks, breaking its windshield. A Norton field supervisor saw picketers hanging on to the windows and mirrors of trucks leaving the Airport Ranch and hitting the trucks with signs. One driver was shot at (his windshield was smashed). Another was told "there was going to be blood." A group of strikers confronted replacements at the motel where they were staying, leaving them all "pretty much scared for our life [sic]." Strikers would drive head-on toward Norton trucks; drive in front of the

trucks and slow down, preventing the trucks from changing lanes or making turns; and throw rocks and bottles at trucks.

Norton complained of much of this activity in two mailgrams sent to the Local on October 5 and 11. The Local president visited the picket line only once. He received periodic reports from the Local's business agent, who was in charge of the negotiating committee, sat on the Local's executive board, and was in charge of coordinating the strike. The president said that aside from the business agent, no one at the union, other than the picketers, was aware of who was picketing or of the location of the lines. The president disbelieved Norton's claims of strike violence and

did not take steps to determine which strikers, if any, were involved.

The business agent testified that no picket captains were ever selected, nor did he give pickets any directions. Even after Norton complained of violence, no one was chosen to report to the Local about the strikers' conduct, although the business agent did speak to strikers about the allegations and did receive a denial. However, the business agent could not recall which strikers he had talked to or how many times he visited the lines. When he did visit the picket lines, he spoke "to them in general, keeping they're [sic] morales up."

The Local's attorney visited the picket line twice, for about 15 minutes each time. After receiving the temporary restraining order, she gave a copy

of the order to a striker, who testified that she told him to reduce the number of pickets.

She represented the arrested striker/negotiator, in a criminal action, free of charge. The striker was reimbursed for the fine, and received about $3,000 from the International for his negotiating and picketing activities. he and other strikers were authorized by the Local to charge food and gasoline for strike related activities.

The strike lasted until December 1982, although there was no evidence of strike activity in the Salinas Valley after mid-October. As a result of the strikers' activities, Norton's harvest was delayed and must of the crop was lost. Norton's equipment sustained

damage, and Norton had to hire security guards.

CONTENTIONS ON APPEAL

On appeal, Local argues first that the trial court erred in instructing on the negligent supervision cause of action because it gave conflicting instructions. It created an irreconcilable conflict in instructions when the court instructed on common law agency principles and the preponderance of evidence standard when it should have instructed only in the language of section 6 of the Norris LaGuardia Act. Appellant contends that the federal statute has in fact preempted certain state common law principles of agency liability, and since section 6 was not applied consistently to all allegations against Local, the judgment finding

Local liable for negligent supervision and awarding compensatory and punitive damages should be reversed.

Secondly, Local contends that the court erred in excluding evidence that was relevant on the issue of Local's exposure to punitive damages. Despite complaining of these errors, however, appellant has waived them as a basis for a reversal of the punitive damages award. Consequently, we deem this issue to be moot.

Finally, appellant asserts that under California common law principles, the award of punitive damages against the Local should be reversed on the ground of insufficiency of proof of malice and oppression as a matter of law.

I. Preemption

Local contends that section 6 preempts state agency liability and preponderance-of-evidence standards and argues that only the clear proof instruction should have been given.

The court instructed the jury on negligence (BAJI Nos.3.10 and 3.11);[4] the theories of liability (agency and respondeat superior),[5] and the standards of proof to be applied (preponderance of evidence and clear and convincing evidence).[6]

The Norris-LaGuardia Act, 29 U.S.C.A. §§101-105, was enacted in 1932. Behind section 6, "[t]he driving . . . force was the fear that unions might be destroyed if they could be held liable for damages done by acts beyond their practical control." (Mine Workers v.

Gibbs (1966) 383 U.S. 715, 736-737). Section 6 by its terms applied to actions in the federal courts, and was held to apply to state tort claims being heard in the federal courts. (ibid.).

Congress did not intend to shield unions from all liability for wrongdoing. "On its face, §6 . . . is concerned only with requiring 'clear proof' that the person or organization charged actually participated in . . . 'such acts.' Nothing . . . suggests that a new and different standard of proof was being prescribed for all issues in actions against a union . . . involved in a labor dispute. . . . [Para.] . . . We find no support in the legislative material that Congress intended broadly to modify the standard of proof where union and employer are sued separately or

together in civil actions for damages incurred in the course of labor disputes." (Ramsey v. Mine Workers (1971) 401 U.S. 302, 309-310.) In enacting the National Management Relations Act in 1947, 29 United States Code sections 141 et. seq., Congress referred to ordinary agency standards for "the responsibility of a union for the acts of its members and officers ... rather than the more stringent standards of §6." (Gibbs, supra 383 U.S. at p.736.)

Congress "neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property

without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result." (United Workers v. Laburnum Corp (1954) 347 U.S. 656, 663-664.)

It is true that remedies for wrong-doing in labor disputes vary. "[T]o the extent that widely disparate remedies theoretically remain available in state, as opposed to federal, courts, the federal policy of labor law uniformity . . . is seriously offended . . . for undoubtedly a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, a fact that Congress evidently took into account in deciding not to disturb the traditional jurisdiction of

the States." (Boys Markets v. Clerks Union (1970) 398 U.S. 235, 245-246)

The United States Supreme Court has long recognized the power of the state courts to award damages under state tort law for violent conduct. "We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' [Citation.]" (Garner v. Teamsters Union (1953) 346 U.S. 485, 488). "[T]here is no ground for concluding that existing criminal penalties or liability for tortious conduct have been eliminated." (Laburnum Corp., supra, 347 U.S. at p. 665.) "'[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by

violence and imminent threats to the public order. [Citations.] . . . State jurisdiction has prevailed in these situations because the compelling state interest . . . is not overridden in the absence of clearly expressed congressional direction.' [Citation.]" (Gibbs, supra, 383 U.S. at p.721.)

The issue of whether this standard should be applied by state courts to state tort claims in its courts has occupied considerable judicial energy.

Kansas, Michigan, Louisiana, Connecticut, Florida, and New Mexico courts have found that section 6 applies to tort claims in state courts.[7] Arizona, North Carolina, and Washington courts determined that state agency rules, and not the more stringent federal rule, apply in their states.[8] Washington is

unique in that its legislature enacted a statute patterned after section 6 but did not apply it to state tort actions.[9] The California Supreme Court, in McCarroll v. L.A. County etc. Carpenters (1957) 49 Cal.2d 45, 63, held that the Norris-LaGuardia Act did not limit the remedial power of the state courts.[10] Although McCarroll was concerned with injunctive relief, California courts, like federal courts, have held that the state is not precluded from regulating tortious conduct even if it arises in the context of labor disputes. In M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union (1981) 124 Cal.App.3d 666, 678-679, the court said, "where the regulated '"conduct touch[es] interests so deeply

rooted in local feeling and responsibility . . ."' the federal labor policy will not be construed to preclude the states from regulating aspects of labor relations that involve such conduct. 'Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States.' [Citations.]"

Appellant urges the court to apply the strict federal standard in state tort cases on the ground that California follows federal labor law in many aspects and that California labor policy and federal labor policy are identical.

California has indeed acted to adopt federal labor law in part. In 1975, the Legislature enacted the Agricultural Labor Relations Act, Labor Code sections 1140 et. seq., based on the National

Labor Relations Act (29 U.S.C.A. §§ 151 et. seq.). California also adopted section 4 of the Norris-LaGuardia Act (29 U.S.C.A. §104) as the Moscone Act, Code of Civil Procedure section 527.3. Section 527.3 limited the ex parte injunctive relief that could be granted by the Court.

Interestingly enough, the Legislature did not enact the provisions of section 6, although the declared public policy was stated in edited but almost identical language[11] to the policy statement of Congress in the Norris-LaGuardia Act (29 U.S.C.A. §102).

This choice on the part of the Legislature cannot be considered to be inadvertent. The omission of a provision contained in a foreign statute providing the model for action by the Legislature

is a strong indication that the Legislature did not intend to import such provision into the state statute. (73 Am.Jur.2d, Statutes, § 334, pp.477-478.) In fact, the California Supreme Court has declared that the Legislature intended the courts to continue to follow principles of California law extant at the time of the enactment of the statute. The Legislature did not intend for the courts to abandon such principles in favor of federal rules which rest on a statutory and administrative basis foreign to California law. (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1979) 25 Cal.3d 317; see also Watson v. Superior Court (1972) 24 Cal.App.3d 53, 60, superseded on another point by Code Civ. Proc.,

§581; Theodor v. Superior Court (1972) 8 Cal.3d 77, 92.)

"It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning. [Citations.] 'An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein.' [Fns. omitted.] [Citation.]" Hennigan v. United Pacific Ins. Co. (1975) 53 Cal.App.3d 1, 7.)

The Arizona court, in Carter-Blogau Labs, supra, 736 P.2d. at p.1167, used

just this reasoning in concluding that section 6 did not apply to its courts: "The fact that Norris-LaGuardia was in existence at the time of the drafting and passage by referendum of Arizona's 'right to work' legislation . . . convinces us that the people of this state deliberately chose not to adopt the more rigorous standard of proof."

We agree, and find, accordingly, that the provisions of section 6 do not preempt California law. The instruction was erroneously given.

A union's responsibility for the acts of its agents is well-established in California. A labor union is an unincorporated association. An unincorporated association is liable for its own torts as if the association were a natural person. An unincorporated association

acts through its officers, agents, or employees. When they are acting within the scope of their office, agency, or employment, their actions bind the association. (Corp. Code, §§24000 et seq.; Marshall v. International Longshoremen's & Warehousemen's Union (1962) 57 Cal 2d 781; Inglis v. Operating Engineers Local Union No.12 (1962) 58 Cal.2d 269; Coats v. Construction & Gen. Laborers Local No. 185 (1971) 15 Cal.App.3d 908)

Local's liability is clear. Notwithstanding the instructional error, appellant was not harmed. Local received the benefit of having the jury instructed on the more stringent provisions of section 6, and a more favorable outcome was not likely to result if those instructions had not been given.

(Vasquez v. Alameda (1958) 49 Cal.2d 674, 677.)

II. Punitive Damages

Local attacks the jury's award of punitive damages, claiming that the evidence was insufficient as a matter of law to support the necessary finding of malice or oppression. Local concedes that given the various verdicts against the various defendants, the award of punitive damages against the union was based solely on negligent supervision coupled with a finding of malice or oppression and extreme indifference to the rights of Norton on the part of Local's managerial employees. Local further concurs that the jury had to have found that these employees acted with knowledge of the probable dangerous

consequences of the strike, and deliberately failed to avoid them.

"[I]n reviewing an award of punitive damages, this court applies the substantial evidence test, reviewing the record in a light most favorable to the judgment. [Citations.] . . . [s]ubstantial evidence is not synonymous with 'any' evidence. Substantial evidence is evidence which is reasonable in nature, credible, and of solid value; it must be of 'ponderable legal significance.' [Citation.]" (Travelers Ins. Co. v. Lesher (1986) 187 Cal.App.3d 169, 200.)

"'[A]ll conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict is possible' . . . and . . . when two or more inferences can be reasonably deduced

from the facts, the reviewing court is without power to substitute its deductions for those of the jury. [Citations.] . . . '[W]e have no power to judge of the effect or value of the evidence, to weight the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom,' [citation] . . . [because] the jury is to find not only the facts but the inferences from them, if any may properly be drawn." (Fibreboard Paper Products Corp. v. East Bay Union of Machinists 91964) 227 Cal.App.2d 675, 696-697.)

Within the meaning of Civil Code section 3294 (allowing recovery of punitive damages where defendant was guilty of oppression or malice), "malice" means

a wrongful intent to vex or annoy; "oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of his rights. Malice and oppression may be inferred from the circumstances of a defendant's conduct. (Monge v. Superior Court (1986) 176 Cal. App.3d 503) Evidence establishing "conscious disregard of another's rights" is evidence indicating that the defendant was aware of the probable consequences of his or her acts and willfully and deliberately failed to avoid those consequences. (Taylor v. Superior Court (1979) 24 Cal.3d 890, 896; Travelers Inc. Co., supra, 187 Cal.App.3d at p.200)

Local's knowledge of and failure to avoid undue consequences were established by evidence that on the first day of the

strike, the arrested striker and negotiated team member asked to be returned to the union hall; he was represented by the union's attorney and the union paid his fine. The next day, the union received the temporary restraining order obtained by Norton, but Local's lawyers passed out a copy of two in English to the strikers (some of whom were Spanish-speaking), told them to limit the number of pickets, and apparently did not herself, nor arrange for anyone else to, make its provisions clear to the pickets. Norton sent mailgrams six days apart, on October 5 and October 11, complaining of the continuing violence. Local's president did not believe the claims and failed to investigate. The business agent asked a group of strikers if they had engaged in

misconduct and was satisfied by their denials; however, he didn't know whom he had talked to nor how often "keeping up [their]morales." The arrested striker, who was on the line almost every day, said he saw the business agent fewer than three times. Local never selected picket captains nor monitored the strikers' conduct.

If an employer, after knowledge or opportunity to learn of his agent's misconduct, retains the wrongdoer in service, the employer may be liable in punitive damages for the misconduct. (Coats, supra 15 Cal.App.3d 908) As in Coats, Local's officers were personally involved in the misconduct, and the Local did not relieve them of their duties when it learned of their wrongdoing. A corporation may be held liable for punitive

damages for the acts of its agents and employees when the act is motivated by actual malice or done under circumstances amounting to oppression, providing that the act is done with the knowledge or under the direction of corporate officials having power to bind the corporation. (Toole v. Richardson-Merrell Inc (1967) 251 Cal.App.2d 689) Local, an unincorporated association, may be held liable for punitive damages in the same circumstances.

The evidence is clearly sufficient to find that the acts were done with the knowledge of officials having power to bind Local, that the acts were done under circumstances amounting to oppression, and that Local acted in conscious disregard of Norton's rights.

DISPOSITION

The judgment is affirmed.

[1]29 U.S.C.A. §106 (hereinafter referred to as "section 6") provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

[2]In 1982, Civil Code section 51.7 provided: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute." (See Stats. 1976, ch.1293, §2, p.5778.)

[3]In 1982, Civil Code Section 52, subdivision (b) provided: "Whoever denies the right provided by Section 51.7, or whoever aids, incites, or conspires in such denial, is liable for each and every such offense for the actual damages and ten thousand dollars ($10,000) in addition thereto, suffered by any person denied such right. In the case of multiple offenders, the ten thousand dollar ($10,000) fine shall be prorated between

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them." (See Stats. 1981, ch.521, §1).

[4] BAJI No.310 provides: "Negligence Is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. [Para.] It is the failure to use ordinary or reasonable care. [Para.] Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. [Para.] [You will note that the person whose conduct we set up as a standard is not the extraordinary cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.]"

BAJI No.3.11 provides: "One test that is helpful in determining or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been [damaged] by or as a result of his action or inaction. If the answer to that question is 'yes', and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence."

Plaintiff's special instruction no.10 read: "The officers of a labor

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union are employees of that union."

[5]The court instructed in the language of BAJI No.13.00, modified: "One is the agent of another person at a given time if he is authorized to act for or in place of such person or if his acts are later ratified by such person. One may be an agent although he receives no payment for his services. For the purposes of this trial, the term 'agent' includes employees and the term 'principal' includes employers."

BAJI No.13.01 provided: "It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority or employment. Such conduct is within the scope of his authority or employment if it occurs while the agent is engaged in the duties which he was employed to perform and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of the agent's authority or employment."

Plaintiff's modified BAJI No.13.30 read: "~~I~~nternational Brotherhood of Teamsters and Local 890 are unincorporated associations. As such they can act only through their officers and employees. Any act or omission of an officer or employee of Local 890, within the

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scope of his authority or employment, is in law the act or omission of Local 890. Any act or omission of an officer or employee of the International, within the scope of his authority or employment, is in law the act or omission of the International."

Plaintiff's modified BAJI Nos.13.06 and 13.07 read: "Defendants International Brotherhood of Teamsters ('International')and Local 890 are also being sued under the theory of respondeat superior, that is, the doctrine that the principal is liable for all acts of his agent or employee committed within the scope of his agency or employment. [Para.] If you find that the International and Local 890, employees or agents for the International, Local 890, or both, were acting within the scope of employment when engaging in any of the wrongful acts alleged, then you must hold the principal (the International and/or Local 890) liable for those wrongful acts. This is true whether you find that the individuals actually committed the wrongful acts or conspired to commit the wrongful acts. [Para.] If you find that Local 890, itself, acted as the agent of the International, and within the scope of its authority committed or conspired to commit any of the wrongful acts alleged, then you must hold the International liable for those wrongful acts. [Para.] However, if you find that no employee or agent of either the International or Local 890, acting within the

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scope of his authority, committed or conspired to commit any of the wrongful acts alleged, then you must not find liability under the doctrine of respondeat superior."

[6]The preponderance-of-the-evidence instruction read: "Except as you will be otherwise instructed, the Plaintiff has the burden of establishing by a preponderance of the evidence the facts necessary to prove all of the issues on which you have been instructed. [Para.] By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it. [Para.] In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it."

Appellant's Instruction A read: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual partic-

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ipation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. [Para.] [Citations] [Para.] Clear proof means clear and convincing proof. Plaintiff is not required to meet the criminal standard of beyond a reasonable doubt. But, Plaintiff may not prevail by meeting the ordinary civil standard of a preponderance of the evidence. [Para.] To prove ratification of unlawful acts Plaintiff must prove that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under the State law or intentionally drew upon the previous violence for their force."

[7]Heistand v. Amalgamated Meatcutters, etc (1983) 233 Kan. 759 [666 P.2d 671]; Sowels v. Laborers' Intern. Union of N. Am. (1981) 112 Mich.App. 616 [317 N.W.2d 195]; Melacon v. United Ass'n of Journeymen (La.App. 1980) 386 So.2d 669, writ refused June 13, 1980, 387 So.2d 596; International U. of Operating Engineers v. Long (Fla.App. 1978) 362 So.2d 987; United Aircraft Corp. v. International Ass'n of Mach (1971) 161 Conn. 79 [285 A.2d 330] interpreting Connecticut statute similar to section 6, cert. den. Jan.10, 1972, 404 U.S. 1016 [92 S.Ct. 675]; Gonzales v. Oil, Chemical and Atomic Workers Int. U. (1966) 77 N.M. 61 [419 P.2d 257].

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[8] R.H. Bouligny Inc. v. United Steelworkers of Amer. (1967) 270 N.C. 160 [154 S.E.2d 344]; Carter-Glogau Labs v. Const. Lab. Local 383 (Ariz. App. 1986) 736 P.2d 1163.

[9] In Buchanan v. Intern. Bro. of Teamsters, etc (1980) 94 Wash. 2d 508 [617 P.2d 1004], in holding that this statute was not applicable to state tort actions for damages, the court relied on a pre-Gibbs ruling in the case of Titus v. Tacoma Smeltermen's Union Local #25 (1963) 62 Wash.2d 461 [383 P.2d 504]. The Titus court held that the statute should not apply to tort cases because the title of the act in which the statute appeared was limited to restraining orders. The Buchanan court acknowledged the Gibbs ruling three years after Titus, but declined to follow it in interpreting the state statute, because of the failure of the Washington legislature, which had met 22 times after the Gibbs case, to amend the statute. Buchanan interpreted the Legislature's silence as concurrence in the Titus result and disapproval of Gibbs (Buchanan, supra at pp. 1005-1006.)

[10]Any doubts as to the validity of the McCarroll ruling were laid to rest by the United States Supreme Court, which said

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approvingly in Boys Markets, supra, 398 U.S. at p.247: "we agree with Chief Justice Traynor of the California Supreme Court that 'whether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so . . . in the Norris-LaGuardia Act . . .' [Citations.]"

[11]Statutes 1975, chapter 1156, section 1 provides: "In the interpretation and application of this act the public policy of this state is declared as follows:

"Under prevailing economic conditions the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. It is therefore necessary that he have full freedom of association and self-organization and the right to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection. . . ."

29 U.S.C.A. §102 declares: "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpful to exercise actual liberty of contract and

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to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . "

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
Sixth Appellate District, No.H001762
S009670

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

I N B A N K

J.R. NORTON COMPANY,

Respondent

v.

GENERAL TEAMSTERS WAREHOUSEMEN AND HELPERS UNION,

appellant

Respondent's Petition for Review DENIED.

Mosk, J., is of the opinion the petition should be granted.

LUCAS-Chief Justice

APPENDIX C

RELEVANT JURY INSTRUCTIONS[1]

NEGLIGENCE

[Proposed by Plaintiff, BAJI No. 310]

Negligence Is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shcwn by the evidence.

It is the failure to use ordinary or reasonable care.

Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

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[1] The relevant instructions are quoted in footnotes 4-6 of the Opinion of the Court of Appeals. See Appendix A, pages A-37 through A-41.

You will note that the person whose conduct we set up as a standard is not the extraordinary cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.

One test that is helpful in determining or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been damaged by or as a result of his action or inaction. If the answer to that question is 'yes', and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

AGENCY

[Plaintiff's special instruction]

The officers of a labor union are employees of that union.

AGENCY

[Proposed by Plaintiff, BAJI No.13.00, modified]

One is the agent of another person at a given time if he is authorized to act for or in place of such person or if his acts are later ratified by such person. One may be an agent although he receives no payment for his services. For the purposes of this trial, the term "agent" includes employees and the term "principal" includes employers.

AGENCY

[Proposed by Plaintiff, BAJI No.13.01]

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority or employment. Such conduct is within the scope of his authority or employment if it occurs while the agent is engaged in the duties which he was employed to perform and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of the agent's authority or employment.

AGENCY

[Proposed by Plaintiff, BAJI No.13.30, modified]

International Brotherhood of Teamsters and Local 890 are unincorporated associations. As such they can act only through their officers and employees. Any act or omission of an officer or employee of Local 890, within the scope of his authority or employment, is in law the act or omission of Local 890. Any act or omission of an officer or employee of the International, within the scope of his authority or employment, is in law the act or omission of the International.

RESPONDEAT SUPERIOR

[Proposed by Plaintiff, BAJI Nos.13.06 and 13.07, modified]

Defendants International Brotherhood of Teamsters ('International')and Local 890 are also being sued under the theory of respondeat superior, that is, the doctrine that the principal is liable for all acts of his agent or employee committed within the scope of his agency or employment.

If you find that the International and Local 890, employees or agents for the International, Local 890, or both, were acting within the scope of employment when engaging in any of the wrongful acts alleged, then you must hold the principal (the International and/or Local 890) liable for those wrongful acts. This is true whether you find that

the individuals actually committed the wrongful acts or conspired to commit the wrongful acts.

If you find that Local 890, itself, acted as the agent of the International, and within the scope of its authority committed or conspired to commit any of the wrongful acts alleged, then you must hold the International liable for those wrongful acts.

However, if you find that no employee or agent of either the International or Local 890, acting within the scope of his authority, committed or conspired to commit any of the wrongful acts alleged, then you must not find liability under the doctrine of respondeat superior.

PREPONDERANCE OF THE EVIDENCE

Except as you will be otherwise instructed, the Plaintiff has the burden of establishing by a preponderance of the evidence the facts necessary to prove all of the issues on which you have been instructed.

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

In determining whether an issue has been proved by a preponderance of the

evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

INSTRUCTION BASED ON § 6 OF THE NORRIS-LAGUARDIA ACT

[Proposed by the Union]

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Clear proof means clear and convincing proof. Plaintiff is not required to meet the criminal standard of beyond a reasonable doubt. But, Plaintiff may not prevail by meeting the

ordinary civil standard of a preponderance of the evidence.

To prove ratification of unlawful acts Plaintiff must prove that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under the State law or intentionally drew upon the previous violence for their force.

APPENDIX D

Tort of Disrupting Business Relations Not Pre-empted by Federal Labor Law

Cite as 89 Daily Journal D.A.R. 9364

PETER VARGAS et al.,
Plaintiffs-Respondents,
v.
RETAIL CLERK'S UNION LOCAL 1428
et al.,
Defendants-Appellants.

No. B027628
Super. Ct. No. EAC23302
California Court of Appeal
Second Appellate District
Division One
Filed July 20, 1989

APPEAL from a judgment of the Superior Court of Los Angeles County, Burton Bach, Judge. Affirmed.

Taylor, Roth, Bush & Effner, Robert A. Bush and Christopher D. Cameron for Defendants and Appellants.

Law Offices of Charles P. Scully, Inc., Donald C. Carroll and Charles P. Scully II as Amici Curiae for Defendants and Appellants.

Law Offices of Herbert Hafif, Herbert Hafif and Harold S. Bottomley III for Plaintiffs and Respondents.

INTRODUCTION

Defendants Retail Clerk's Union Local 1428 and Jesse Gonzales appeal from a judgment in favor of plaintiffs Peter Vargas, Kenneth Henderson and Chino Farms Market. The jury awarded Chino Farms Market $2,602,765 in compensatory damages and $2,602,765 in punitive damages against the union for intentional interference with business relations, and $1,000 in compensatory damages and $1,000 in punitive damages against Jesse Gonzales for intentional interference

with business relations. The jury awarded Peter Vargas $300,000 against the union and $8,000 against Jesse Gonzales for intentional infliction of emotional distress. Kenneth Henderson also was awarded $300,000 against the union for intentional infliction of emotional distress.

STATEMENT OF FACTS

The power of an appellate court begins and ends with the determination whether any substantial evidence, contradicted or uncontradicted, will support the trial court's finding. (**Foreman & Clark Corp. v. Fallon** (1971) 3 Cal.3d 875, 881.)

Plaintiffs Peter Vargas (Vargas) and Kenneth Henderson (Henderson) opened plaintiff Chino Farms Market (the market) in June 1974; the market was incorporated

and owned by Vargas and Henderson. Both Vargas and Henderson had previous experience in the grocery business, and had worked together in the past.

The market was unionized, its employees belonging to defendant Retail Clerk's Union Local 1428 (the union). When the employees' contract expired in March 1975, an interim contract was agreed to while negotiations for a new contract took place. The market and the union did not reach an agreement on a new contract and on September 22, 1975, the employees went on strike. The strike lasted until October 31, 1976.

On the first night of the strike, Henderson spoke to Carl Smith (Smith), the union's local business agent at the time. He said, " 'Carl, why don't you

get these pickets jobs.' " Smith replied, " 'We don't care about the people. We're gonna break you.' "

Although the first week or two of the strike were peaceful, the situation then changed drastically. The pickets began blocking the entrance to the store and the driveways, swearing at customers, taking down their automobile license numbers, and scattering nails or carpet tacks in the parking lot. Plaintiffs obtained a temporary restraining order limiting the number and location of pickets, preventing the pickets from obstructing, blocking or hindering access to the market or parking lot, from threatening or intimidating customers, employees or people doing business with the market, and from damaging plaintiffs' property. Plaintiffs' attorney gave

copies of the TRO to Smith and the other pickets, who promptly tore them up and threw them on the parking lot.

The pickets continued to block doors and driveways and to swear at customers, and plaintiffs obtained a preliminary injunction with the same provisions as the TRO. This had as much effect on the pickets as the TRO. When Henderson told Smith he was violating the injunction, Smith told Henderson to take him back to court - he would go broke quicker. The pickets continued to exceed the permitted number and to block access to the market and parking lot.

A number of acts of vandalism occurred during the strike. The market's delivery truck had its windows broken and was spray-painted. Bales of cardboard stored behind the market were broken up

and the cardboard strewn about. The sump pump in the loading dock was damaged. Graffiti was placed on the walls of the market.

When Vargas was helping to unload a delivery truck, picket Shirley Miller disrupted the process, endangering the workers. Another time, picket Judy Cuthbertson Caro (Caro) and a second picket blocked the unloading; Caro then sued Vargas for assault and battery. She later told him that Smith and Jesse Gonzales (Gonzales), the picket captain, told her to file the suit; they would have witnesses to back her up and would share in the proceeds.

Vargas heard from a picket that Smith was offering money for breaking market and truck windows. He also heard the union was offering extra money to

pickets who vandalized the market and employees' automobiles. Both Smith and Gonzales threatened Vargas, and Smith told him the union, to which Vargas belonged, would not allow him to receive his pension. Vargas received telephoned threats at the market that it would be bombed, and at home, in the middle of the night, that there was a bomb in the house. His home sprinkler system also was vandalized.

John Camacho (Camacho) worked at the market both before and during the strike. He frequently observed pickets standing on the pressure plates to open the market's doors. The pickets pushed shopping carts into the street, where he would have to retrieve them. When he tried to return shopping carts to the market, pickets would block him or push the line

of carts aside. On more than one occasion, he had to sweep up nails on the parking lot and he observed locks on the market doors jammed with foreign substances. He heard pickets curse at customers and saw them writing down customers' automobile license numbers and blocking their access to the store either by standing in their way or by pushing shopping carts in front of them. More than once, Gonzales taunted him as he was working the parking lot. As the strike progressed, Camacho noticed "a lot less" customers shopping at the market.

Brent Felbob (Felbob) was employed by the market during the strike. He also observed the pickets blocking market entrances and driveways, bumping into customers and directing obscenities at them. He saw nails spread all over the

parking lot and flat tires on customers' automobiles. The pay telephones, vending machine, flowerbeds and sidewalk in front of the market were vandalized; food and beverages were thrown against the store windows and graffiti was written on the walls; Felbob saw the pickets engage in much of this vandalism. Felbob himself was taunted and challenged; his motorcycle was tampered with and destroyed, but he did not see who did it. As the strike wore on, Felbob observed, customers complained about the picketers' activities and finally stopped shopping at the market.

Viola Schaefer, a regular customer of the market, observed the pickets, including Gonzales, block doors and driveways, verbally harass customers, flatten tires in the parking lot, place

graffiti and commit other vandalism on market premises. On several occasions the pickets blocked her entrance into the market and used foul language in her presence. She often saw customers approach the market, turn around, and leave when confronted with the picketers; as the strike progressed, there were fewer and fewer customers.

Ethel Martin (Martin) was another regular customer of the market; at the time of the strike she was 69 years old and lame. On one occasion two pickets pushed a shopping cart in front of Martin and her husband as they attempted to enter the market and asked why they were shopping at Chino Farms Market instead of another store. Martin explained she was crippled and the store was closest to her house. The pickets did not move and

Martin and her husband were forced to go around them; as they did so, one of the pickets told Martin, "I hope you break your leg."

Gary Riezebos (Riezebos) was a young teenager during the strike and went to the market after school with his friends almost every day; they played the pinball machines there and sometimes volunteered to help Vargas doing odd jobs around the market. He also saw graffiti painted all over the walls, a broken window, and damage to the delivery truck. When the truck was spray-painted, he took a rag and some turpentine to clean its head-lights. Gonzales attempted to photograph him, so Riezebos kept his head down to avoid him. As he returned to the market, he held the rag in front of the camera to avoid having his picture taken. Gonzales

threatened him and Riezebos began to run; Gonzales followed and kicked him in the back. On another occasion, Riezebos and his friends hid by the loading dock to see who was painting graffiti on the walls. One of the strikers spotted them, so they started for the door to the market; the striker and Gonzales blocked them. The striker attempted to take a walking stick from one of Riezebos' friends and, when the boy wouldn't let go of it, threw him against the wall hard enough to loosen the stick; he then picked up the stick and broke it over his knee.

Edward Flannagan and Larry Nordell, patrol officers with the City of Chino Police Department during the strike, were called to the market at various times to investigate incidents occurring there.

Neither was able to make any arrests because the crimes occurring at the market during the strike were misdemeanors committed out of their presence. Whenever Officer Nordell spoke with a picket regarding something which had occurred, the picket responded by asking, "Can you prove it?"

Louis Moreno was a captain with the City of Chino Police Department and a regular customer of the market. When various people told him about problems with strikers at the market he contacted the strike captain and pickets to let them know violence and illegal acts would not be tolerated. He nonetheless observed pickets blocking the driveways and the doors to the market. He also saw broken glass and nails in the parking lot and water balloons that had been thrown

into the store, but he was unable to make any arrests because he had not seen the pickets cause these problems. On one occasion he attempted to enter the market to shop but a picket blocked him; he was in plain clothes at the time. The picket told him he (Captain Moreno) did not want to shop at the market and said, "You know, it wouldn't be very healthy for you to walk in the store. Why don't you just leave. Don't you know there's picketing going on?" Captain Moreno insisted on shopping at the market and showed the picket his badge; the picket then walked away. Captain Moreno identified the picket as Larry Sooter (Sooter), who was then a business agent for the union. Captain Moreno observed a dramatic decrease in the number of customers at the market over the course of the strike.

Daniel Valdez (Valdez) was hired as a picket by Gonzales one to two weeks after the strike began; he was one of a number of hired pickets. He received no instruction as to how to conduct himself on the picket line. He and other pickets would walk slowly across the driveways to prevent vehicles from entering the parking lot. He also removed tire stems from tires on vehicles on the parking lot; when Gonzales learned of it, he told Valdez he should have gotten all the tires. On several occasions, Valdez put tacks or nails under the tires of vehicles on the lot; he got the nails from Gonzales's automobile, and Gonzales told him to throw the nails under the customers' tires. Valdez would physically block customers trying to enter the market and curse at them; other pickets

did the same. Gonzales was present when this occurred. Valdez also threatened to beat up people, but Gonzales told him not to do so because it would bring the police. Valdez estimated the pickets were successful in preventing two out of ten customers from shopping at the market. Valdez ultimately either was fired from the picket line due to the number of complaints about his conduct or left because he was arrested and jailed; he could not recall which.

Judy Cuthbertson Caro was also hired by Gonzales as a picket and was not given any instruction on how to conduct herself while picketing. She observed pickets - including Gonzales - throw tacks or nails in the parking lot. She also saw pickets put substances such as horse manure in front of the market doors to offend

people. One picket, Jeff Grimes, told her he had broken the windows of the market's delivery truck.

At one point, Smith offered Caro and fellow picket Marie Braun Bartlett (Bartlett) $100 to burn Vargas's house or automobile; they refused the offer. Smith also offered money to the pickets if they would break the market's windows.

Caro admitted filing the lawsuit against Vargas, but did so at the union's behest. She ultimately had it dismissed, no longer wanting to be a part of what the union was doing.

Dr. Gerhard N. Rostvold, an economist, was plaintiffs' expert witness; he undertook to determine the financial effects of the strike. He testified that a peaceful, noninterfering strike would

generally lead to a 20 percent decrease in a market's net sales. He defined a peaceful, noninterfering strike as one in which pickets walk back and forth near the market, letting their signs speak for them. A violent, interfering strike would include: "harassment of customers as they walked in the door or try to walk in the door; verbal threats; intimidation; interference; blocking the doorway; nails on the parking lot; damaged vehicles; vandalism: you cut the wires of trucks; you splatter eggs around the premises; you let air out of a tire; you put graffiti paint on the wall; the citizens of Chino driving by and seeing police cars on the lot."

He calculated the total financial loss to the market and subtracted 20 percent attributable to a peaceful,

noninterfering strike, which left a loss of $2,602,765 attributable to the violent, interfering nature of the strike. Further, it was these elements which eventually put the market out of business in early 1977; had the strike been peaceful and noninterfering, the market would have been able to survive.

CONTENTIONS

I

Defendants contend that the tort of intentional interference with business relations, which lay at the heart of the entire complaint, was preempted by federal labor law and was not a proper basis for awarding damages.

II

Defendants further contend that even if the tort of intentional interference with business relations is not preempted, the trial court erroneously failed to instruct the jury that the union could be held vicariously liable for the tort only upon clear proof of its actual responsibility for violence or threats of violence.

III

Defendants assert that the opinion testimony of Dr. Rostvold, plaintiffs' expert, should have been excluded, in that it was based upon assumed facts not in evidence and unreliable hearsay.

IV

Defendants additionally assert that the trial court committed reversible error when it permitted the jury to hear irrelevant out-of-court declarations and inflammatory evidence.

V

Finally, defendants contend that the punitive damages award must be reversed because federal labor law preempts state law in this area and does not permit such awards against labor unions.

DISCUSSION

I

Defendants contend the tort of intentional interference with business relations, which lay at the heart of the

entire complaint, was preempted by federal labor law and was not a proper basis for awarding damages. We disagree.

Under the doctrine of preemption, where federal and state law cover the same area, federal law preempts state law (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law § 7, p. 49.) If the federal law does not clearly state an intent to preempt state law, the state law will be upheld "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." (**Malone v. White Motor Corp.** (1978) 435 U.S. 497, 504.)

Labor law cases addressing preemption generally involve the National Labor

Relations Act (NLRA) (29 U.S.C. § 151 et seq.), the Labor Management Relations Act (LMRA) (29 U.S.C. § 141 et seq.) or the Norris-La Guardia Act (29 U.S.C. §§ 101-115); the principles applied to one act are equally applicable to the others (see, e.g., **Mine Workers v. Gibbs** (1966) 383 U.S. 715, 730-731). Discussing the preemptive effect of the NLRA, the United States Supreme Court stated in **Wisconsin Dept. of Industry v. Gould Inc.** (1986) 475 U.S. 282, 286: "It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in **San Diego Unions v. Garmon** (1959) 359 U.S.

236, that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' **Garner v. Teamsters Union** 346 U.S. 485, 498-499 (1953), the **Garmon** rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. (See **San Diego Unions v. Garmon, supra**, 359 U.S. 236, 247.) The rule is to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration,' (Id. at p. 243), and this Court has recognized that

'[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.' **Motor Coach Employees v. Lockridge** (1971) 403 U.S. 274, 287."

However, "[f]ederal labor policy as reflected in the National Labor Relations Act, as amended, has been construed not to preclude the States from regulating aspects of labor relations that involve 'conduct touch[ing] interests so deeply rooted in local feeling and responsibility that ... we could not infer that Congress had deprived the States of the power to act.' ... Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." (**Machinists v. Wisconsin Emp. Rel. Comm'n** (1976) 427 U.S. 132, 136, footnote and

citation omitted.) The state retains " 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' " (**Garner v. Teamsters Union, supra**, 346 U.S. 485 at p. 488.) While federal labor law leaves much to the states, however, it does not specify how much, as the number of cases on the subject of preemption reflects.

In general, preemption cases involve restriction by the states of conduct protected or regulated by federal law. One line of cases has held, " ' "When it is clear or fairly may be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment

requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." ' " (**Machinists v. Wisconsin Emp. Rel. Comm'n, supra,** 427 U.S. 132, 139.)

A second line of cases has inquired "whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' " (Id. at p. 140.) Even if section 7 does not specifically protect conduct, Congress could have intended such conduct to be unrestricted by any government regulation because it is among the permisssible "economic weapons in reserve." (Id. at p. 141.)

In the federal scheme, " 'the use of economic pressure by the parties to a labor dispute is ... part and parcel of the process of collective bargaining.' " (Id. at p. 144.)

Relying on the foregoing principle, defendants in the instant case argue: "The tort alleged, and that upon which liability was based, is the tort of intentional interference with business relations .... Yet federal law authorizes a labor union intentionally to interfere with an employer's business relations." Defendants acknowledge state courts may provide a monetary remedy for torts in the area of labor relations which are based on violence or threats of violence but they imply that damages must be based on a cause of action other than inten-

tional interference with business relations. They make no suggestion as to what such causes of action might be, especially in the case of a business whose main loss would be in the area of its business relations.

In our view, defendants have misinterpreted the case law in this area. The focus of the inquiry in dealing with preemption should not be on the type of harm suffered or the nature of the cause of action but on the type of conduct affected by state law. If federal labor law protects or regulates the conduct involved, there can be no state-law action for damages. If the conduct is unprotected and amenable to state regulation, a state-law action may be maintained for damages and it may be whatever

type of action is appropriate for the type of injury suffered.

San Diego Unions v. Garmon, supra, 359 U.S. 236, involved the question whether the state court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin. The court noted that in enacting labor law, "Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces.' " (Id. at p. 240.) Thus, in determining the question of preemption, the court's focus was on the **nature of the activities** the state sought to regulate, not the method of the regulation adopted. (Id. at pp. 243, 246-247.) The state's jurisdiction had to yield if the activities it sought to regulate were protected by, or an unfair

labor practice under, the NLRA. (Id. at p. 244.) Since only peaceful union activity was involved, the state court had no jurisdiction to award damages. (Id. at pp. 247-248.)

In **Mine Workers v. Gibbs, supra,** 383 U.S. 715, a mining company hired plaintiff as a mine superintendent and gave him a contract to haul the mine's coal; he was to employ workers who were members of a union which was defendant's rival. Armed members of defendant's local union forcibly prevented the opening of the mine and beat the rival union's organizer. When the area field representative for defendant, the international union, learned of the violence, he instructed the local to establish a limited picket line, prevent further violence and prevent the spread of the strike to other

mines, which it did. However, plaintiff lost his job, the hauling contract, and other trucking contracts at nearby mines. He sued defendant for violating section 303 of the LMRA prohibiting secondary boycotts, and raised state law claims for unlawful conspiracy and boycott and interference with contract. He recovered damages under state law for interference with his employment relationship. (**Mine Workers v. Gibbs, supra**, 383 U.S. 715, 718-721.)

The court was called upon to determine whether damages properly were awarded under state law. The court reviewed numerous cases consistently recognizing states' rights to deal with violence and threats of violence during labor disputes. (Id. at pp. 729-730.) San Diego Unions v. Garmon, supra, 359

U.S. 236, 247, held that states had the right "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." **Automobile Workers v. Russell** (1958) 356 U.S. 634, 638, footnote 3, observed that such damages required a proximate relation between the loss and the violence and threats of force and violence. (**Mine Workers v. Gibbs, supra**, 383 U.S. 715, 730.) In **Allen-Bradley Local v. Board** (1942) 315 U.S. 740, 748 and **Auto Workers v. Wisconsin Board** (1956) 351 U.S. 266, 269-270, footnote 3, the court noted that state administrative injunctive relief could prohibit only the continuation of unlawful picketing. (**Mine Workers v. Gibbs, supra**, 383 U.S. 715, 730.) And **Youngdahl**

v. Rainfair, Inc. (1957) 355 U.S. 131, 139, declared that a state court could not enjoin all picketing of premises but must permit peaceful picketing; however, the state court could enjoin future acts of violence, intimidation and threats of violence.

In some cases, the court had allowed a state injunction against all picketing, but that picketing had been enmeshed with violent conduct and the two could not practically be separated. If the same facts that appeared in those cases appeared in an action for damages, there might be support for the conclusion that all damages were caused by the violent component of the picketing. However, where the consequences of peaceful and violent conduct are separable, a plaintiff may recover damages for the latter

only. (**Mine Workers v. Gibbs, supra,** 383 U.S. 715, 731-732.)

On the facts before the **Gibbs** court, only the early violence occurring in the first two days would justify applying state tort law. Thus, the question was whether the pleadings, arguments and jury instructions adequately defined the compass within which damages could be awarded under state law. The tort claimed was in essence a conspiracy to interfere with plaintiff's contractual relations, and the record showed the notion of conspiracy employed by plaintiff expanded the application of state law beyond the limits of defendant's involvement in violence. Under the state law of conspiracy, in order to impose liability on defendant it was necessary

to show defendant had a part in a conspiracy, some of whose members engaged in violence in furtherance of the conspiracy's purposes; it was not necessary to show defendant actually authorized, participated in, or ratified the use of violence. (Id. at pp. 732-733.) By not requiring a finding of defendant's involvement in the violence before liability was imposed, the jury instructions did not keep the conspiracy concept within any proper bounds. (Id. at pp. 733-734.) Because violence or threats of violence were "the essential predicate" of any recovery, it was necessary to reverse the judgment. (Id. at pp. 735-742.)

Both **Garmon** and **Gibbs** focused on the conduct involved in determining whether federal labor law preempted the state-law

claims. **Gibbs** did not hold that plaintiff could not sue for interference with his contractual relations, or that the entire tort was preempted by federal law which allows unions to use economic weapons in labor disputes. Rather, it held plaintiff could maintain the cause of action so long as it was based upon the union's use of violence and threats of violence, conduct not protected by federal labor law and which the state properly regulated. (383 U.S. at pp. 730, 735.)

California cases, too, have focused on the nature of the conduct in determining whether to apply state law. In **M Restaurants Inc. v. San Francisco Local Joint Exec. Bd. Culinary Etc. Union** (1981) 124 Cal.App.3d 666, during a labor dispute defendants set up a picket line

around plaintiff's restaurant. They stationed 50 to 100 pickets at the entrances, blocking the doorways; pickets jeered and booed potential customers, tried to force handbills on them and made negative statements about the restaurant. The restaurant obtained a temporary restraining order and preliminary injunction enjoining defendants from blocking access to the restaurant, from threatening and/or committing acts of intimidation and physical violence, and from disturbing the peace. (Id. at pp. 672-72.)

The question before the court was whether the legislation permitting issuance of the injunction (Code Cov. Proc., § 527.3 [patterned after the Norris-La Guardia Act, which regulates the issuance of injunctions in labor

disputes]) conflicted with federal labor policy. The court viewed the statute not as restricting otherwise permitted conduct but as enlarging the scope of conduct left to the free play of economic forces designed to further union rights by limiting unnecessary judicial intervention. (Id. at p. 678.) The statute allowed an injunction to be issued to bar conduct involving at the lest fraud, violence, or breach of the peace, and at the most other unlawful conduct. It is well established that states may enjoin unlawful activities, such as violence, intimidation, obstruction, public safety hazards and threats; federal labor policy does not protect such conduct and the states have the right to police it. Thus the court could properly enjoin picketing that obstructed

access to the restaurant and would tend to lead to violence. (Id. at pp. 680-682.)

Although **Maheu v. CBS Inc.** (1988) Cal.App.3d 662 involves federal copyright law rather than labor law, it nonetheless illustrates how the preemption doctrine focuses on conduct rather than on the nature of the cause of action. Plaintiff in **Maheu** sued defendants for intentional interference with contract or prospective economic advantage based upon their publication of letters belonging to him; defendants claimed preemption by federal copyright law. The court pointed out that "[i]n enacting the Copyright Act of 1976, Congress intended that state law claims for interference with contract or prospective economic advantage would be preempted where based on unauthorized use

or copying of copyrightable property. '[T]o the extent that the unfair competition concept known as "interference with contractual relations" is merely the equivalent of copyright protection, it would be preempted.' [Citations.]" (Id. at p. 677.) Because the foregoing was the basis of plaintiffs claim, it was preempted. (Id. at p. 678.)

There is no support for the contention that federal labor law has preempted the entire tort of interference with business relations in a labor dispute. Rather, that tort has been preempted only to the extent it is based upon conduct protected or regulated by the federal law.

If the conduct is that which has been left to the states to regulate, such as violence and threats of violence, it

may form the basis of a state-law suit for intentional interference with business relations.

II.

Defendants claim on appeal that even if the tort of intentional interference with business relations is not preempted, the trial court erroneously failed to instruct the jury that the union could be held vicariously liable only upon clear proof of its actual responsibility for violence or threats of violence. We disagree.

As this opinion has pointed out, the United States Supreme Court has recognized the right of states to provide remedies for violence and threats of violence arising in labor disputes "as defined by the traditional law of torts."

(**Mine Workers of America v. Gibbs**, supra, 383 U.S. 715, 729-730.) That case held that section 6 of the Norris-La Guardia Act applied "to federal adjudications of state tort claims arising out of labor disputes." (**Id.** at p. 737.) **Gibbs** does not, however, extend section 6 to a state court's adjudication of state torts, and we do not believe section 6 extends that far.

McCarroll v. Los Angeles County Etc. Carpenters (1957) 49 Cal.2d 45, 63, likewise states that the Norris-La Guardia Act's terms limit the federal courts. The act, however, "did not limit the remedial power of the state courts [citations], and could not constitutionally have done so since its prohibition was not restricted to injunctions in labor disputes affecting interstate

commerce or any other subject over which Congress has paramount power." The act primarily intended to restrict the federal equity power to issue injunctions in a case growing out of a labor dispute. (Id. at p. 63; 29 U.S.C., §§ 101 and 113, subd. (d).) Insofar as conduct affected the "compelling state interest in the maintenance of domestic peace," state tort law provided remedies for the direct consequences of violent conduct. (**Mine Workers v. Gibbs, supra**, 383 U.N. 715, 730.)

M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary Etc. Union, supra, 124 Cal.App.3d 666, 674-676, went further than **McCarroll**. **M Restaurants** stated that the Norris-La Guardia Act limited federal jurisdiction to issue injunctions in labor disputes

except where fraud or violence occurred. Moreover, the act relied constitutionally on Congressional power under article III, section 1, to define and limit federal court jurisdiction. "The act merely restricted and limited equitable remedies and did not make substantive changes in the law." (Id. at p. 675, citing Frankfurter & Greene, The Labor Injunction (1930), p. 215.)

Besides the Act's jurisdictional origins, limitations upon its intended purpose, and the lack of federal Supreme Court extension of section 6 to encompass adjudication of state torts in state courts, an issue arises concerning the substance of section 6. That section states: "No officer or member of any association or organization, and no association or organization participating

or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (29 U.S.C., § 106.)

Some controversy once existed about the effect and nature of section 6. As summarized in **Brotherhood of Carpenters v. U.S.** (1947) 330 U.S. 395, 402-403, some commentators felt section 6 changed the substantive law of agency in labor disputes, while others considered it simply a rule of evidence. The analysis in **Mine Workers v. Gibbs, supra**, 383 U.S. 715, 737, however, indicates that the later view is correct. The statute's

history and rationale "suggest that Congress meant to signify a meaning like that commonly accorded such similar phrases as 'clear, unequivocal, and convincing proof.' Under this standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion."

This analysis conforms to California Evidence Code section 115, stating that "[t]he burden of proof may require a party to ... establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." Section 6, specifying the burden

of proof required in cases under its jurisdiction, does not therefore apply to state torts outside the scope of the statute. It is true that a state court exercising concurrent jurisdiction may not employ a state rule of practice or procedure to defeat substantively a federal right. (Lehto v. Underground Constr. Co. (1977) 69 Cal.App.3d 933-943.) But where a federal statute leaves state torts intact and the cause of action arises from state substantive law, no question about a choice between federal and state law arises. It is elementary that a state court not exercising concurrent federal jurisdiction will apply state rules of evidence in adjudicating state tort remedies.

The only California case on point, J.R. Norton Co. v. General Teamsters,

Warehousemen & Helpers Union Local 890 (1989) 208 Cal.App.3d 430, in which the California Supreme Court denied defendant union's petition for review on May 18, 1989, confirms this view. In **Norton**, the trial court had awarded compensatory and punitive damages t an employer on several causes of action for losses caused by a union's negligent supervision of strikers during a labor dispute. **Norton** rejected the union's claim on appeal that 29 U.S.C. section 106 preempted state law. Citing **Gibbs, United Workers v. Laburnum Corp.** (1954) 347 U.S. 656, 663-664, and **Garner v. Teamsters Union, supra**, 346 U.S. 485, 488, **Norton** demonstrated that the Norris-La Guardia Act and subsequent judicial interpretation did not disturb state tort remedies for harm caused by violent conduct in labor disputes, and

did not override a state's exercise of jurisdiction to satisfy its compelling state interest in regulating traditional local matters of public safety. (J.R. **Norton Co. v. General Teamsters Warehousemen & Helpers Union, Local 890, supra,** 208 Cal.App.3d 430, 440; see also **M. Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary Etc. Union, supra,** 124 Cal.App.3d 666, 678-679.)

Norton moreover cited the Legislature's failure to incorporate the section 6 provisions, even though the Agricultural Labor Relations Act, California Labor Code section 1140 et seq. and the Moscone Act, Code of Civil Procedure section 527.3 and relied on other aspects of the Norris-La Guardia Act. **Norton** concluded that this nonincorporation of section 6

reflected a conscious legislative determination to retain California law as it existed at the time the statutes were enacted, and held that the provisions of section 6 do not preempt California law. Hence the union's liability was determined according to the established state rule that acts of union officers, agents, or employees within the scope of their office, agency, or employment bind the union. (J.R. Norton supra, v. General Teamsters, Warehousemen & Helpers Union, Local 890, supra, 208 Cal.App.3d 430, 441-443.)

We therefore conclude that in the case at bench, the trial judge correctly instructed the jury according to the California standard of proof.[1]

Defendant on appeal also argues that a union is not responsible for every act

of its anonymous members or employees. The three authorities cited, however, do not support this proposition in light of the circumstances of the instant case.

In **Marshall v. International Longshoremen's & Warehouseman's Union** (1962) 57 Cal.2d 781, a union member sued his own union for injuries caused by a fall over a concrete obstruction in the union parking lot allegedly maintained by the union and its officers, named as defendants. **Marshall** stated that while each union member may not be liable under the respondeat superior doctrine for acts of union officers, agents, and employees, the union as a legal entity may nevertheless be responsible for negligence. (Id. at p. 785.) **Marshall** held that the union member could sue his union for negligent acts he neither participated in

nor authorized, and could satisfy from union funds alone any judgment he might recover against the union. (Id. at p. 787.) The case at bench does not ajudicate a union's negligence liability to one of its own members. With different facts and a different cause of action from those in the case at bench, **Marshall** nonetheless actually supports the principle that a union as a legal entity can sustain tort liability.

United States v. White (1944) 322 U.S. 694, also cited by defendant, simply holds that the constitutional privilege against self-incrimination does not apply to unions faced with a subpoena duces tecum to produce union records in its custody and that might tend to incriminate a union officer. (Id. at pp. 698-

701.) The case at bench does not implicate this constitutional right.

White does reference the rule that "[t]he actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question." (**Id.** at p. 702.) The third case defendant cites, In re **Coleman** (1974) 12 Cal.3d 568, indicates the circumstances under which a union can be held liable for acts during a labor dispute. In **Coleman**, union officials, members, and employees who planned and carried out daily mass picketing committed "numerous acts of violence, harassment, and intimidation. For such conduct the organization as an entity must properly be held account-

able." Although conceding that an individual member's acts do not bind the union without proof that the union authorized or ratified the acts in question, **Coleman** held that "the evidence uniformly indicates the mass picketing and acts of violence were integral to a concerted organizational effort to debilitate the [employer, a convalescent hospital]." (Id. at p. 573.)

Coleman thus establishes that a consistent pattern of violence and threats of violence can prove a concerted effort by a union which will support the union's tort liability for those acts. By instructing the jury that "if you find that union officials, agents, members and/or employees, both named and unnamed, planned and carried out any unlawful acts, then the union itself must be held

accountable," the trial court in the case at bench gave an instruction consistent with **In re Coleman.** (Id. at p. 573.)

Defendant also objects to several jury instructions because they authorized the jury to find liability for "unlawful" conduct by the union local.[2]

In reviewing jury instructions, an appellate court considers not whether a particular instruction's wording misstates applicable law, but whether the instructions viewed as a whole misguided the jury. (**People v. Southern Pacific Co.** (1983) 139 Cal.App.3d 627, 634.) Moreover, a jury instruction must be interpreted to support rather than to defeat the judgment if it is reasonably susceptible to such interpretation. (**Tele-Count Engineers, Inc. v.Pacific**

Tel. & Tel. Co. (1985) 168 Cal.App.3d 455, 463.)

Instructional error, like any error, must be affirmatively shown, and an appellate court indulges all intendments and presumptions to support a lower court's judgment as to matter about which the record is silent. (**Jacques Interiors v. Petrak** (1987) 188 Cal.App.3d 1363, 1369.) The plaintiff on appeal cites its "memorandum of law re special jury instructions," filed February 23, 1987, arguing only that federal law entirely preempts state law claims. No other objection in the trial court is cited on appeal.

The existence of federal labor law, as we have pointed out, does not preempt state remedies for torts arising out of labor disputes. "Labor has no sanctuary

in any federal right when it departs from the bounds of peaceful persuasion and resorts to acts of violence, physical intimidation or false statement." (**United Farm Workers of America v. Superior Court** (1976) 16 Cal.3d 499, 505.) The instructions are consistent with **M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary Etc. Union**, supra, 124 Cal.App.3d 666, 679-680, permitting the courts to enjoin actual or threatened violence to persons, actual or threatened destruction of property, fraud, breach of the peace, disorderly conduct, unlawful blocking of access or egress to premises where a dispute exists, or other unlawful activity, activity containing threats of injury, violence or reprisals, and activity creating public safety hazards or which obstructs

ingress and egress. Each of the specified activities in the instructions can be reasonable construed as containing either violence or the threat of violence.

During the strike, the pickets blocked store entrances and driveways; swore at customers; took down automobile license numbers; and scattered nails or carpet tacks in the parking lot. The pickets disregarded both the preliminary injunction and temporary restraining order against these activities. Numerous acts of vandalism also occurred during the strike, damaging or defacing plaintiff's business property. Pickets also disrupted deliveries, endangered workers, and blocked unloading; Vargas received telephone threats that the market would be bombed and that there was a bomb in

his home, and found that his home sprinkler system had been vandalized. Pickets pushed shopping carts into the street, jammed locks on market doors with foreign substances, blocked the way of customers entering or leaving the store, vandalized pay telephones, a vending machine, flower beds, and the sidewalk in front of the market, threw food and beverages against store windows, wrote graffiti on the walls, placed horse manure in front of market doors to offend people, and flattened tires and removed tire valve stems from cars in the parking lot. Customers were threatened; one was told by a picket, "You know, it wouldn't be very healthy for you to walk in the store. Why don't you just leave. Don't you know there's picketing going on?"

Construing the instructions as a whole, keeping in mind the burden of proof on the appellant to show error affirmatively, and with due regard to the presumptions favoring the correctness of the trial court's judgment, we find no prejudice or other basis upon instructional error to disturb the trial court's judgment. No "miscarriage of justice" occurred. (**People v. Watson**, 46 Cal.2d 818, 835-836.)

[NOTE: The remaining portions of the majority decision deal with issues not related to §6 of the Norris-LaGuardia Act. For the sake of brevity, they are not reproduced herein.]

DISPOSITION

The judgment is affirmed.

HANSON (Thaxton), J.

I concur:

ORTEGA, J.

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1. The trial court delivered the following jury instruction, based on BAJI No. 2.60: "In order to recover for intentional interference with business relations, Plaintiff CHINO FARMS INCORPORATED has the burden of proving by a preponderance of the evidence all of the following: 1. That there was an economic relationship between Plaintiff and its customers and that this relationship was likely to produce future economic benefits to Plaintiff; 2. That defendants knew of that relationship; 3. That the defendants intentionally committed unlawful acts that were designed to disrupt the relationship; 4. That the Defendants' intentional unlawful acts were the proximate cause of the disruption of the economic relationship; and 5. That Plaintiff suffered damages caused by the disruption of the relationship." The trial court also instructed the jury that "[i]f you find that union officials, agents, members and/or employees, both named and unnamed, planned and carried out any unlawful acts, then the union itself must be held accountable."

2. The instruction based on BAJI No. 2.60 has been quoted, **supra**, in footnote 1. The instruction based on **Seamans Direct Buying Service, Inc. v. Standard Oil Co.** (1984) 36 Cal.3d 752, 765-768, and **Buckaloo v. Johnson** (1975) 14 Cal.3d 815, 827, read as follows: "One of the essential elements that plaintiff Chino Farms, Inc., must prove to succeed on its claim for intentional interference with prospective economic relationship is that defendants intended to unlawfully interfere with plaintiff's economic relationship with plaintiff's customers. To prove this intent, plaintiff must show that defendants' unlawful acts were designed to disrupt the relationship. However, if you find that defendants were substantially certain that their unlawful conduct would interfere with plaintiff's prospective economic advantage, you may infer from that fact that defendants intended to cause the disruption." The instruction based on **Fifield Manor v. Finston** (1960) 54 Cal.2d 632, and **Lipman v. Brisbane Elementary Sch. Dist.** (1961) 55 Cal.2d 224, 232, read as follows: "Another essential element that plaintiff Chino Farms, Inc., must establish to prevail on a claim for intentional interference is the actual disruption of the economic relationship between plaintiff and its customers. To establish this element, plaintiff must prove that defendants' unlawful conduct either prevented plaintiff from continuing on with its relationship with its customers and/or made plaintiff's continuance of that

relationship more burdensome or expensive." The defendant union also objects on appeal to the following instruction: "Plaintiff, Chino Farms, Inc., may recover damages proximately caused by defendants interference with prospective business advantage where the right to pursue a lawful business was intentionally interfered with by any of the following: by employing more pickets on plaintiff's premises than allowed by court order; by obstructing, blocking or hindering ingress or egress or plaintiff's customers; by obstructing, hindering, stopping, slowing or interfering with the movement of vehicles owned by plaintiff's customers; threatening and/or committing acts of intimidation and/or physical violence against plaintiff's business, property, officers, customers, patrons or others desiring to do business with plaintiff, or by the filing of groundless civil lawsuits."

SPENCER, P.J.

While I concur in the majority's holdings in parts I, III, IV and V, ante, I respectfully dissent as to the holding in part II, ante. I would agree with defendants the trial court erred in failing to instruct the jury the union

could be held vicariously liable for the tort only upon clear proof of its actual responsibility for violence or threats of violence.

As the majority points out, a union may not be held liable for the acts of its members involved in a labor dispute unless it actually authorized, participated in or ratified the use of violence or threats of violence which injured the plaintiff. (**In re Coleman** (1974) 12 Cal.3d 568, 573; see **Mine Workers v. Gibbs** (1966) 383 U.S. 715, 733-735.) Plaintiffs do not challenge the application of this rule to the instant case but try to expand the scope of the conduct amenable to state regulation. They cite **San Diego Unions v. Garmon** (1959) 359 U.S. 236, a pre-Gibbs case, which allows state tort compensation for conduct

"marked by violence and eminent threats to the public order" (at p. 247). They also cite **United Workers v. Laburnum Corp.** (1954) 347 U.S. 656, another pre-**Gibbs** case, as affirming a judgment awarding damages for "tortious conduct that was also characterized as 'unlawful.'" However, **Laburnum** merely said the Labor Management Relations Act did not expressly relieve unions from liability for "unlawful conduct." (347 U.S. at p. 666.) The case itself clearly involved violence and threats of violence. (Id. at pp. 657-658.)

Plaintiffs also cite cases which characterize mass picketing and certain language as threatening violence or likely to provoke violence (**Youngdahl v. Rainfair, Inc.** (1957) 355 U.S. 131, 138; **Rainbow Tours v. Hawaii Joint Council**

(9th Cir. 1983) 704 F.2d 1443, 1447). These cases simply illustrate when conduct falls within the "violence and threats o violence" which **Gibbs** holds is the proper basis for a state-law action; they do not expand that proper basis.

Gibbs also discusses the standard of proof by which a union may be held liable for the acts of others involved in a labor dispute. **Gibbs** points out section 6 of the Norris-LaGuardia Act (29 U.S.C. § 106) imposes a special burden of proof on those seeking to hold a labor organization liable for the acts of others. (383 U.S. at p. 735.) That section provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any

court of the United States for the individual acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." (Emphasis added.) Defendant claimed section 6 applied to state-law claims adjudicated in federal court and the court agreed. (Gibbs, supra, 383 U.S. at p. 735.)

The court noted it held in Brotherhood of Carpenters v. U.S. (1947) 330 U.S. 395, 403: "'whether § 6 should be called a rule of evidence or one that changes the substantive law of agency ... its purpose and effect was to relieve organizations ... and members of those organizations from liability for damages or imputation of guilt for lawless acts

done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member changed with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.'" (383 U.S. at p. 736.) Shortly thereafter the Labor Management Relations Act was passed which expressly provided, for the purposes of that statute, the responsibility of a union for acts of its members is judged by ordinary principles of agency, not the more stringent standards of section 6. (Ibid.) But section 6 remained applicable to state law claims, which was not surprising since punitive damages may be recovered on state claims and the driving force behind section 6 was the fear

unions could be destroyed if held liable for damage caused by acts beyond their control. (Id. at pp. 736-737.) The "clear proof" required by section 6 is the equivalent of " 'clear, unequivocal, and convincing proof.'" (Id. at p. 737.)

Section 6 of the Norris-LaGuardia Act, by its terms, applies only to federal courts. (**McCarroll v. L.A. County etc. Carpenters** (1957) 49 Cal.2d 45, 63.) It applies even when the federal courts are adjudicating state-law claims. (**Gibbs, supra**, 383 U.S. at p. 735.) The question, then is whether it applies to state courts adjudicating state-law claims.

Until recently, there has been no California authority on point, but other courts had addressed the issue. Michigan

has held section 6 applicable to state-law claims in state court, based upon the policy underlying its enactment. (**Sowels v. Laborers' Intern. Union of N. Am.** (1981) 112 Mich.App. 616 [317 N.W.2d 195, 196-197].) Louisiana has applied section 6 to state-law claims. (**Coates v. Loc. 270 of Int. Bro. of Teamsters** (La.App.2 Cir. 1984) 449 So.2d 662, 663-664; **Melancon v. United Ass'n of Journeymen** (La.App. 1980) 386 So.2d 669, 670.) Kansas, while holding section 6 does not apply to the states, nonetheless adopted section 6's standard of proof for the purposes of consistency with the federal courts and conformity with congressional intent. (**Hiestand v. Amalgamated Meatcutters, etc.** (Kan. 1983) 666 P.2d 671, 675.) The Hiestand court opined:

"Consistency between our state and federal courts would be obtained by adopting the clear proof standard of § 6. The United States Supreme Court in **Mine Workers v. Gibbs, [supra,]** 383 U.S. at 737 ... held 29 U.S.C. § 106 applied to federal court adjudications of state tort claims arising out of labor disputes. Forum shopping would not loom as a possibility. Plaintiffs would have no reason to commence actions in state courts attempting to avoid the clear proof standard of federal courts thereby bypassing Congressional intent. Defendant unions would have no reason to attempt removal to federal courts in an effort to obtain the added protection of the clear proof standard. In addition, consistency in the state and federal courts regarding the burden of proof would eliminate the

injustice to those litigants having no right to federal jurisdiction. One may prevail in the state system but fail in the federal system under the same factual situation due to differenc burdens of proof required." (666 F.2d at p. 675.)

As previously mentioned, the California Supreme Court already has held in **McCarroll v. L.A. County etc. Carpenters, supra**, 49 Cal.2d at page 63 that section 6 by its terms applies to the federal courts only, bit it did not address the standard of proof issue. The Legislature has not enacted, as have other state legislatures, its own version of section 6. Plaintiffs therefore "respectfully submit that this Court should not act as a judicial substitute for the State Legislature" by adopting

the clear proof standard set out in section 6.

However, the courts sometimes do adopt the clear and convincing evidence standard in the absence of a legislative pronouncement on the issue. In **Lillian F. v. Superior Court** (1984) 160 Cal.App.3d 314, the court addressed the question as to the standard of proof to apply in hearings under Welfare and Institutions Code section 5326.7, subdivisions (f) and (g), to determine whether convulsive treatment may be administered to an involuntarily-committed mental patient. The court observed: "Evidence Code section 115 provides in relevant part that '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' Evidence Code section 160,

however, specifies that 'law' includes decisional and constitutional as well as statutory law. Evidence Code section 115 also specifies three differenc burdens of proof: 1) proof beyond a reasonable doubt; 2) proof by clear and convincing evidence; and 3) proof by a preponderance of the evidence." (160 Cal.App.3d at p. 320.) the purpose of the standard of proof " 'is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." [Citation.] The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.' " (Id. at p. 322.)

To determine the correct standard of proof, the court considered the nature and purpose of the proceeding at issue and the interests involved and, balancing the state's interest in obtaining appropriate treatment for the patient with the patient's right not to have such a drastic procedure forced on her, the court concluded the clear and convincing evidence standard should be applied in the proceedings at issue. (**Id.** at pp. 321, 323; see also, e.g., **In re Angelia P.** (1981) 28 Cal.3d 908, 915-922 [clear and convincing evidence standard applied to proceedings under Civil Code section 232, subdivision (a), to free a minor child from parental custody]; **People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater** (1982) 128 Cal.App.3d 937, 940 [applied to proof of obscenity in public

nuisance abatement action];
Conservatorship of Sanderson (1980) 106 Cal.App.3d 611, 618-620 [applied to conservatorship proceedings under Probate Code].)

As the foregoing cases demonstrate, this court may adopt the higher standard of proof - by clear and convincing evidence - where warranted in the absence of a legislative enactment to that effect. In my view, the propriety of adopting the higher standard of proof is supported by Congress' determination such a standard of proof should apply in federal court adjudications of state-law claims in order to protect unions from potential destruction through compensatory and punitive damage awards based upon acts beyond their control. (**Mine Workers v. Gibbs**, supra, 383 U.S. at pp. 736-737).

Adoption of the higher standard of proof also is justified to combat the tendency to blame unions for everything occurring during a strike, whether authorized or ratified or not (**Ramsey v. Mine Workers** (1971) 401 U.S. 302, 310) and to prevent forum shopping for the most favorable standard of proof (**Hiestand v. Amalgamated Meatcutters, etc., supra**, 666 P.2d at p. 675).

The question whether the higher standard of proof should be adopted has recently been addressed by **J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890** (1989) 208 Cal.App.3d 430, review denied May 18, 1989. **J.R. Norton Co.**, as does the instant case, involved a labor dispute and the contention ""section 6 preempts

state agency liability and preponderance-of-evidence standards." (At p. 437.) In discussing the issue, the court first notes the enactment of section 6 was motivated by " 'the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control.' " (Id. at p. 439, quoting from **Mine Workers v. Gibbs**, **supra**, 383 U.S. at pp. 736-737.) However, "Congress did not intend to shield unions from all liability for wrongdoing" and did not intend that the stringent standards of section 6 be applied in all situations. (**J.R. Norton Co. supra**, at p. 439.) Neither did Congress intend to preclude all state court tort actions. (Id. at p. 440.) This means different rights and remedies will exist in different jurisdictions (Ibid.)

The court then discusses the application of section 6 in various states, noting six states have applied section 6 to tort claims in their courts and three have declined to do so. (Id. at pp. 440-441.) It points out our Supreme Court in McCarroll v.L.A. County etc. Carpenters, supra, 49 Cal.2d 45 held the Norris-LaGuardia Act did not limit the state courts' remedial power. (208 Cal.App.3d at p. 441.) Defendant nonetheless "urge[d] the court to apply the strict federal standard in state tort cases on the ground that California labor policy and federal labor policy are identical." (Ibid.)

The court acknowledges California has adopted federal labor law in part. (Ibid.) In 1975 the Legislature enacted the Agricultural Labor Relations Act

(Lab. Code, § 1140 et seq.) based on the National Labor Relations Act (29 U.S.C. § 151 et seq.). It also enacted the Moscone Act (Code Civ. Proc., § 527.3), patterned after section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). (208 Cal.App.3d at pp. 441-442.)

But, the court observes, when the Legislature adopted section 4 of the Norris-LaGuardia Act, it did not adopt section 6, even though the stated purpose of the Moscone Act was similar to that of the Norris-LaGuardia Act. (Id. at p. 442.) In the court's opinion, "[t]his choice on the part of the Legislature cannot be considered to be inadvertent," and it concludes the Legislature's failure to enact section 6 meant it intended to follow preexisting California law. (Id. at pp. 442-443.) It therefore holds

section 6 does not preempt California law. (Id. at p. 443.)

I am unpersuaded by the J.R. Norton Co. opinion for several reasons. First, the opinion does not make clear the specific limitations as well as requirements of section 6. It is true the section is limited in scope; it applies only to state law claims in federal courts (**Mine Workers v. Gibbs, supra**, 383 U.S. at pp. 736-737), and only when it is sought to hold union or employer liable for the acts of others during the course of a labor dispute (**Ramsey v. Mine Workers, supra**, 401 U.S. at p. 310). But in all federal cases where it is applicable, it must be applied to require clear proof the organization participated in, authorized or ratified the acts before the organization may be held liable. (Id. at

pp. 310-311.) Different standards of proof only apply to different issues or types of cases. (Id. at p. 309.)

More importantly, the crux of the opinion is the court's conclusion the Legislature's failure to enact the provisions of section 6 when it enacted the provisions of section 4 was a deliberate choice not to adopt section 6. (J.R. Norton Co., supra, 208 Cal.App.3d at p. 442.) In support of this conclusion, the court cites the principle: "The omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not intend to import such provision into the state statute." (Ibid., citing 73 Am.Ur.2d, Statutes, § 334, p. 478.)

However, there is also a "general rule that the intent of the legislature is indicated by its action, and not by its failure to act." (Id., § 169, p. 372, fn. omitted.) In accordance with this principle, it has been held, for example, evidence of unpassed bills has little value in determining legislative intent. (**Miles v. Workers' Comp. Appeals Bd.** (1977) 67 Cal.App.3d 243, 248, fn. 4; see also 58 Cal.Jur.3d, Statutes, § 162, pp. 564-565.)

Moreover, the legislative history of Code of Civil Procedure section 527.3, the Moscone Act patterned after section 4 of the Norris-LaGuardia Act, which has been provided to this court by defendants, does not reveal any intent to reject section 6; rather, it reveals an intent to deal with one specific problem

- the issuance of injunctions during labor disputes - by adoption of provisions similar to those in section 4. Section 6 does not deal with this problem.

In determining legislative intent, which is a primary guide in construing a statute (**California Teachers Assn. v. San Diego Community College Dist.** (1981) 28 Cal.3d 692, 698), the court may rely on extrinsic aids such as legislative committee reports, which are presumed to express legislative intent (**Southland Mechanical Constructors Corp. v. Nixen** (1981) 119 Cal.App.3d 417, 427). The Senate Committee on Judiciary report on Senate Bill 743, the Moscone Act, as introduced, indicates the bill would prohibit issuance of restraining orders

or injunctions which prohibit the enumerated activities. It states the purpose of the bill is to "[p]rotect the rights of workers engaged in collective bargaining, picketing, or other mutual aid from interference by the courts with the normal processes of dispute resolution between employers and recognized employee organizations." It comments the bill is patterned after the Norris-LaGuardia Act and the "so-called 'Little Norris-La Guardia Acts' enacted by at least ten states. ... However, the 'Little Norris LaGuardia Acts [sic]' are much broader than this bill. In addition to prohibiting injunctions against leafleting and picketing, they generally severely restrict the right to obtain an injunction against any labor-related activity, and

prescribe substantial procedural requirements in addition to those normally applicable in proceedings for injunctive relief. Compared to those statutes, this bill is quite limited in its scope. [Para] This bill appears to do little more than to codify existing constitutional case law concerning the First Amendment rights of workers."

The Senate Republican Caucus Third Reading analysis of the bill points out the proponents of the bill contend "superior court judges routinely issue injunctive relief against labor activities whenever the threat of conflict is present, without giving due regard to the decisions of the United States Supreme Court invalidating such decrees. The right to appeal these decrees, even when a reversal is certain, is of little

value, according to the proponents, since time is crucial in labor disputes, and a timely review on appeal is virtually impossible."

The Senate Democratic Caucus Third Reading analysis and the Assembly Committee on Labor Relations report express similar views to the two foregoing documents. The Assembly Third Reading analysis prepared by the Assembly Republican Caucus notes Senator Moscone states the bill is an attempt to codify present case law which is being ignored by many judges.

The Assembly Third Reading analysis, prepared by the Assembly Office of Research, comments: "According to the Assembly Labor Relations Committee analysis, labor unions have long held that injunctions and temporary restraining

orders issued by superior courts to restrict pieketing [sic] and other strike activity constitute an unfair infringement of a union's conduct in a labor dispute. The ability of an employer or a law enforcement agency to obtain a court order which restricts the number and location of pickets during a strike can so seriously hamper a union's effort that the effect of the strike is negated or prolonged unreasonably. The committee analysis advises there may also be validity to the argument that injunctions and temporary restraining orders may in fact increase the likelihood of violence in labor disputes rather than minimize it, as employers and some law enforcement agencies have contended.

"This measure provides restraints on the courts' power to issue prohibitory

injunctions and orders on a considerably narrower basis than those contained in the Norris-LaGuardia Act. Protected activities are specifically limited to peaceful picketing, assembly, and dissemination of information. The committee analysis also notes that in large part, the right to engage in these activities is guaranteed under the First Amendment of the Constitution."

The foregoing legislative history reveals the intent to deal with one specific problem - the interference of the courts in labor disputes by issuing restraining orders and injunctions - and to codify existing constitutional law with respect to the First Amendment rights of the workers in such situations. Section 4 of the Norris-LaGuardia Act addresses this issue; section 6 does not.

This leads ineluctably to the conclusion the Legislature in enacting the Moscone Act did not intend to reject section 6; it did not consider the matter at all.

This being the case, the basic foundation on which J.R. Norton Co. rests is faulty, and I would decline to follow the case. Based on the reasons previously stated, I would adopt the higher standard of proof to conform with section 6.

Turning now to the issue at hand, the propriety of the jury instructions, defendants contend the instructions misstated the basis on which the union could be held liable for interference with plaintiff Chino Farms Market's business relations. The court, on its own motion, gave the following version of BAJI No. 2.60, delineating plaintiff's

burden of proof: "In order to recover for intentional interference with business relations, Plaintiff CHINO FARMS INCORPORATED has the burden of proving by a preponderance of the evidence all of the following: [Para] 1. That there was an economic relationship between Plaintiff and its customers and that this relationship was likely to produce future economic benefits to Plaintiff; [Para] 2. That Defendants intentionally committed unlawful acts that were designed to disrupt the relationship; [Para] 3. That the Defendants intentionally committed unlawful acts that were designed to disrupt the relationship; [Para] 4. That the Defendants' intentional unlawful acts were the proximate cause of the disruption of the economic relationship; and, [Para] 5. That Plaintiff suffered damages

caused by the disruption of the relationship." This instruction erroneously allowed the jury to find defendant union liable for the acts of others by a preponderance of the evidence, and to find the union liable even when those acts were merely unlawful and not necessarily violent or threatening violence.

Plaintiffs' special instructions numbers 13 and 14 compounded the problem, referring to defendants' "unlawful" conduct when discussing intent and causation. Plaintiffs' special instruction number 10 described the conduct upon which liability could be based; it included conduct which was unlawful but clearly not violent or threatening violence: "Plaintiff, Chino Farms, Inc., may recover damages proximately caused by

defendants [sic] interference with prospective business advantage where the right to pursue a lawful business was intentionally interfered with by any of the following: by employing more pickets on plaintiffs [sic] premises than allowed by court order[;] by obstructing, blocking or hindering ingress or egress of plaintiffs' customers; threatening and/or committing acts of intimidation and/or physical violence against plaintiffs' business property, officers, customers, patrons or others desiring to do business with plaintiff, or by the filing of groundless civil lawsuits."

As to the union's liability for the acts of others, the court instructed, on its own motion: "If you find that union officials, agents, members and/or employees, both named and unnamed, planned and

carried out any unlawful acts, then the union itself must be held accountable." (Emphasis added.) The court also gave instructions on general principles of agency: "One is an agent of another person called a 'principal' at a given time if he is authorized to act for or in place of such person. One may be an agent although he receives no payment for his services. For the purposes of this trial, the term 'agent' includes servants and employees and the term 'principal' includes employers." (BAJI No. 13.00.) "It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority or employment. Such conduct is within the scope of his authority [or] employment if it occurs while the agent is engaged in

the duties which he was employed to perform and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of the agent's authority [or] employment." (BAJI No. 13.01.) These instructions allowed the jury to find union liability for acts not actually authorized, participated in or ratified by the union. And, as with the other instructions, union liability was extended to "unlawful acts" rather than violence or threats of violence.

Plaintiffs contend defendants waived any objections to these instructions. Although the proceedings at which the jury instructions were discussed were not recorded, there is a record of those

instructions which were refused or withdrawn. Some of those requested by defendant, which set forth the proper standard of proof and bases for liability, were withdrawn; based on this, plaintiffs claim waiver.

However, the reason for withdrawing the instructions is not shown by the record, and there are other instructions, refused by the court, which cover the same topics. Defendants' special instruction number 1 provided in pertinent part: "[I]n order to recover damages from defendant Union, plaintiff Chino Farms Market has the burden of proving by clear, convincing and unequivocal evidence that defendant Gonzales, or by any agent, officer, or employee."

Defendants' special instruction number 2 stated: "The activity of unions

and their members in the course of strike and picketing activity is generally afforded the protection of law as an expression of the constitutional right of freedom of speech and assembly and under state and federal statutes favoring collective bargaining. Only acts of violence, threats of violence, intimidation, and physical interference [sic] with the coming and going into the premises is a basis for recovery in this action. Because 'intimidation' is an inherently subjective and ambiguous term, I instruct you further on the permissible and impermissible forms of verbal expression by picketers during a strike." However, the court modified this instruction by striking everything after the word 'assembly,' i.e., everything re-

ferring to violence and threats of violence.

After the court refused defendants' special instruction number 1 and modified number 2, there was no reason for defendants not to withdraw other instructions which they then knew would be unacceptable to the court. Having proposed correct instructions, their objection to the incorrect instructions given was preserved. (See Code Civ. Proc., § 647; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 242, p. 248.) Moreover, waiter must be clear and unequivocal, not open to speculation or doubt. (**City of Ukiah v. Fones** (1966) 64 Cal.2d 104, 107-108; **Harder v. Kaiser Cement Corp.** (1983) 144 Cal.App.3d 616, 619.) The record before the court contains no clear and unequivocal evidence of waiver.

Since the instructions given were erroneous, it must be determined whether they were prejudicial. Instructional error requires reversal where the erroneous instructions were likely to mislead the jury and thus become a factor in the verdict. (**Searle v. Allstate Life Ins. Co.** (1985) 38 Cal.3d 425, 439; **Henderson v. Harnischfeger Corp.** (1974) 12 Cal.3d 663, 670.)

The instructions given allowed the jury to find the union liable for conduct for which it could not be held liable - that not involving violence or threats of violence and that not actually authorized or ratified by the union. There was evidence of acts which, although unlawful, were not necessarily violent or threatening violence. Such acts included violations of the preliminary injunction

as to number and location of picketers, defacing the market with graffiti, thrown food and other objects, littering on market premises, putting horse manure by the door of the market, insulting customers and subjecting them to foul language. There also was conflicting evidence as to what acts strike captain Jess Gonzales and union business agent Carl Smith were aware of, not to mention authorized or ratified.[1] Compounding the problem was the instruction lowering the standard of proof, making it easier for the jury to find authorization or ratification in the face of conflicting evidence. I would conclude the instructions given were quite likely to have misled the jury and become a factor in the verdict, making the instructional error prejudicial and requiring reversal of the verdicts in

favor of plaintiff Chino Farms Market and against defendant union.[2]

Although defendants do not raise the issue, I would address sua sponte the question whether the same infirmities which affect the market's award against the union also affect the awards to Vargas and Henderson for intentional infliction of emotional distress by the union. Again, the higher burden of proof was not applied and the instructions covered only ordinary principles of agency.

A state-law action for intentional infliction of emotional distress in the context of a labor dispute may be maintained against a union where based on outrageous conduct. (**Farmer v. Carpenters** (1977) 430 U.S. 290, 301-306.) As previously discussed, as a matter of

federal policy, the union may not be held liable for such conduct unless it actually participated in, authorized or ratified such conduct. (29 U.S.C. § 106; see **Mine Workers v. Gibbs, supra**, 383 U.S. at pp. 733-735.) Additionally, there must be clear proof of the union's participation, authorization or ratification. (29 U.S.C. § 106; **Gibbs, supra**, at pp. 736-737.) In conformity with this policy, and for the sake of consistency with the federal courts, these rules must apply to a state court action for intentional infliction of emotional distress. (Cf. **Hiestand v. Amalgamated Meat Cutters etc., supra**, 666 P.2d at p. 675.) They were not applied here, and this was error. For the reasons previously discussed, I would hold the error was prejudicial and requires reversal of the

verdicts in favor of plaintiffs Vargas and Henderson and against defendant union as well.

SPENCER, P.J

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1. For example, Gonzales testified he did not see pickets block the traffic flow into the store; he knew nothing about the damages to the delivery truck, baled cardboard, sump pump or Vargas' sprinkler system; as far as he knew, the pickets did not throw trash in front of the market or paint graffiti on the walls. He denied giving Valdez nails to spread on the parking lot.

Smith testified he instructed the pickets to obey the TRO and preliminary injunction; he never instructed them to commit acts of violence or vandalism, saw them commit such acts or committed such acts himself. He denied offering Caro and Bartlett money to firebomb Vargas' house or automobile.

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2. It might be noted the jury based its damage award figure on the testimony of Dr. Rostvald. He testified that 20 percent of the total loss to the market was attributable to the strike itself, while the remainder of the loss was attributable to the "violent and interfering" elements of the strike. His figure for total losses less 20 percent

was the one chosen by the jury as the damage award. However, this does not render the instructional error harmless. Dr. Rostvald's definition of "violent and interfering" included such activity as vandalism to the market premises, all verbal interaction between picketers and customers, and the presence of police vehicles on the market parking lot. A peaceful, noninterfering strike was defined as simply picketers walking back and forth near the market. Dr. Rostvald's definition of violence was quite broad and included nonviolent and even protected conduct, such as vigorous efforts to dissuade customers from shopping at the market. Therefore, the fact the jury accepted his figures as to damages does not negate a finding of prejudice.